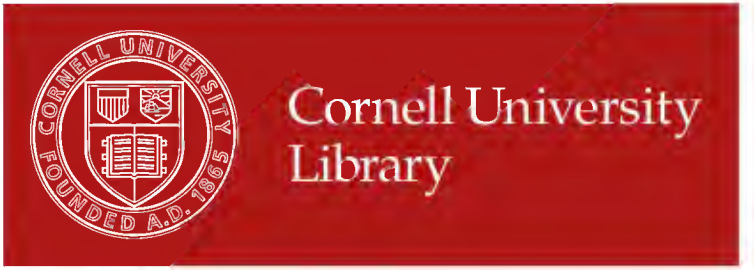
WAR AND THE PRIVATE CITIZEN

A. PEARCE HIGGINS



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WAR AND THE PRIVATE CITIZEN

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Studies in International Law

By

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With

INTRODUCTORY NOTE

by

THE RIGHT HONOURABLE ARTHUR COHEN, K.C

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INTRODUCTORY NOTE

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THE RIGHT HONOURABLE ARTHUR COHEN, K.C.

Dr. A. Pearce Higgins is the author of what is, in my opinion, by far the most instructive and valuable work that has been written on the Hague Conferences and the London Naval Conference of 1909. His account of these conferences is equally clear and accurate, and his criticism of the work achieved by them is remarkable for its great ability and perfect impartiality. He does not belong to those writers who eulogize everything done at the Hague or in London; on the contrary he proves in several cases that the terms of the Conventions are so vague and uncertain and contain so many conditions and qualifications, that they will be found to be of little or no value. But whilst he does not allow his judgment to be blinded by the humanitarian principles so profusely expressed in the recitals and preambles of the Conventions and in the

speeches of the Delegates, Dr. Higgins does not fail to recognize the valuable results which have been actually attained.

In explaining the result of the second Peace Conference at the Hague, Dr. Higgins said: "The Conference was not a failure, it was disappointing, but it is not discouraging. The work of future Conferences will be greatly assisted if more careful preparation is made of the questions to be brought forward."

It is therefore of great importance that the many important questions of International Law which are left undecided should be carefully studied and investigated before the meeting of the next Hague Conference, and one main object of these studies to which I am writing this introductory note, is to examine some of these questions and to set forth the arguments on both sides.

In the first chapter the author treats of the effect of war on the private citizen as distinguished from the armed forces of the belligerent state, and he proves how the usual statement that a war is a contest between the armed forces of belligerent states is a most imperfect and inaccurate definition, inasmuch as it conceals the important fact that every war must necessarily to some extent affect a non-combatant citizen of the belligerent state, whether he be on land or in a merchant ship at sea, and may

in many cases most seriously injure him both as regard person and property.

In the second chapter the author explains those rules of International Law which relate to hospital ships and the carriage of passengers and crews of destroyed prizes.

The third chapter deals in a very careful and interesting manner with the novel and difficult questions which have arisen and are likely to arise as to the rights and responsibilities of newspaper correspondents in naval warfare, especially in connexion with the modern system of wireless telegraphy.

The fourth and fifth chapters have for their subject matter the conversion of merchant ships into ships of war, and the opening by belligerents to neutrals of trade closed in time of peace. These two questions were discussed both at the Hague Conference and at the Naval Conference in London, but it was found impossible to arrive at any agreement, and under the Declaration of London they were left to be determined by the International Prize Court according to justice, equity, and good conscience. It is on this point that the Declaration of London seems to me open to the gravest objection, for these two most important questions should not have been left for the decision of such

an International Prize Court as was established by the Hague Conference, but ought to have been expressly reserved by the British Government. These two questions are fully discussed by Dr. Higgins with the same ability and impartiality that characterized his earlier and larger work, and his arguments and observations undoubtedly deserve serious consideration. It would be improper for me to enter upon a discussion of the topics with which Dr. Higgins deals in his five chapters, for to do so would be to swell an introductory note into a treatise, and I will content myself with saying that if these chapters be carefully studied we shall, to use the words of Dr. Higgins, "be saved from many of the rash assertions and deceptive half truths which have characterized some of the recent dicussions of questions of International Law."

ARTHUR COHEN.

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AUTHOR'S PREFACE

THE following studies on topics connected with the laws of war are in different degrees concerned with their relation to the private citizen. The first, which gives its title to the volume, was used as the basis of an Inaugural Lecture at the London School of Economics and Political Science for the session 1911–12; it also formed the basis of a public lecture in the Law Schools in Cambridge. As written, it was found to be much too long for the conventional time allowed for a lecture, and even as it is, it is necessarily lacking in several particulars. To have gone into greater detail would have been an attempt, and a vain one, to compress the work of a Session, or at least of a Term, into one lecture, for there are few points in which war does not affect the private citizen. I have endeavoured to show the great possibilities of harm which war may occasion to the civilian population. It was recently pointed out in the House of Commons that the working classes of this country

—including, as I understand this term, all the professional and trading classes as well as artisans—have not yet realized the terrible hardships and sufferings they would be exposed to in the case of a war of invasion, for they would be the first to suffer. The ordinary Englishman knows nothing of what war means from personal experience—and long may he remain ignorant on that ground—and thinks little of the need for preparation for possible eventualities, except under the stress of a political crisis ; I felt, therefore, that as I had an opportunity of showing its potentialities in an atmosphere of academic calm, it would be well to draw the outline in no uncertain manner. I believe that the wider the diffusion of the knowledge of International Law, and particularly of that branch of it which relates to war, the greater is the hope for the maintenance of peace. That this extended knowledge of the laws of war, or the propaganda of the formula that it is impossible for one civilized nation to gain economically by the conquest of another will put an end to war I do not think probable. They may, however, assist in moments of tension in steadying popular feeling, and aid in producing a calmer outlook ; but, as I have pointed out, war remains possible so long as the motives for war re-

main, its causes are elemental, and defencelessness and attack are in this connexion frequently correlative terms. "So long as current political philosophy in Europe remains what it is," says the Author of "The Great Illusion," I would not urge the reduction of our war budget by a single sovereign." The lecture was written before the outbreak of war between Italy and Turkey, but I have added some few allusions to it in the text and notes.

The chapters on *Hospital Ships and the Carriage of Passengers and Crews of Destroyed Prizes* and *Newspaper Correspondents in Naval Warfare* are here reproduced with slight alterations from *The Law Quarterly Review* and *Die Zeitschrift für Völkerrecht und Bundesstaatsrecht* respectively.

In the chapter on *The Conversion of Merchant Ships into Ships of War* I have endeavoured to examine this complicated question in an impartial manner, stating the arguments for and against conversion on the high seas from the standpoints of each group of Powers. The conclusion I have reached is that the British position, with the addition of the Italian compromise, should be maintained in the interests of both neutrals and belligerents.

The chapter on *The Opening by Belligerents to Neutrals of Closed Trade* involving the

principle of the Rule of War of 1756 was suggested by the failure of the Naval Conference of London to reach an agreement on the proposal on this subject introduced by the German Delegate.

The recent discussions on the Declaration of London and the Naval Prize Bill, by drawing attention to the importance of International Law, have, I think, gone a long way towards breaking down the hitherto-prevailing idea that the law of nations is the concern of only a few specialists ; that this small collection of studies may assist to the same end is my desire.

I wish, in conclusion, to express my warm thanks to Mr. Cohen for his very appreciative Introductory Note. I also wish to thank the naval and military officers who have given me their valuable criticism on some of the topics treated of in these pages with which, in time of war, they would be concerned.

A. Pearce Higgins.

Cambridge, 27 *April*, 1912.

I

THE LAWS OF WAR IN RELATION TO THE PRIVATE CITIZEN

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I

THE intercourse of states is largely regulated by rules which have acquired the binding force of law, and to this body of rules the name of International Law is given. In modern times, the normal relation of states to each other is one of peace, but this was not always so, and the name by which some of the earlier publicists designated the law of nations, namely "The law of war and peace"—Grotius for example called his great book, published in 1625, *De jure belli ac pacis*—clearly denoted that war was the more prominent in their thoughts as it was in the facts of life. It is to one aspect of war that I wish to devote myself in this lecture, namely as it affects the private citizen. It is an aspect of great importance for the laws of war apply not only to the armed forces of the belligerent states but also to the civil population. The sanctions of these laws are severe, frequently death, and breach

and punishment generally follow in quick succession.

The time is not inopportune for drawing public attention to the position in which the ordinary citizen would find himself if war unfortunately broke out. The advance towards a pacific solution of international difficulties is not hindered, rather it is helped, by endeavouring to realize what is the actual situation which war produces. If a knowledge of what war really means were more widely diffused it would often quell outbreaks of Jingoism and produce a more serious and sober appreciation of international politics. Arbitration has been making fresh conquests in recent years, and all lovers of peace and peaceful methods of terminating disputes between nations —and who is not a lover of peace ?—have welcomed the increasing number of arbitration treaties and the submission of disputes to the decision of Arbitration Tribunals. Unfortunately the history of the past fifty years shows that not even the closest relations between states can be regarded as a guarantee for the maintenance of a permanent peace, and I am afraid that we shall make a great mistake if we imagine that "the doleful song" of "clanging fights and flaming towns, and sinking ships and praying hands" has become for us but "a tale of little meaning,"

or if we think we are about to witness the realization of the vision of the Prophet Isaiah. An examination of the history of arbitrations during the past century shows that it is impossible to fix precise bounds beyond which this method of settling international disputes may be said to be impracticable, but as Professor J. B. Moore in his work on *American Diplomacy* (p. 21) says, "this is far from affirming that the use of force in the conduct of international affairs will soon be abolished." There are undoubtedly powerful forces at work in the world making for peace, but there are also forces making for war. Wars of aggression and conquest may indeed be "great illusions," but unfortunately, states are slow to appreciate this, and do not show any overwhelming evidence of a wish to be disillusioned. "The factors which militate against peace, are," as von Moltke said more than twenty years ago, "to be found in the peoples themselves." [1] At the present moment the unsettled state of affairs in Europe, in the near, middle and far East calls us to face the possibilities of war.

I say possibilities rather than probabilities, for it has often happened that the darkest outlook internationally has been the deep blackness before

[1] See G. Peel, *The Enemies of England*, p. 244.

a dawn of peace and quiet, while the reverse has not infrequently been the case. The very magnitude of the evils threatened is sometimes the cause of the discovery of a means of avoiding apparently impending disaster. Europe welcomed the dawn of a new era by the Great Exhibition of 1851, the Crimean War broke out in less than three years. The world acclaimed the first Peace Conference in 1899, the ink was hardly dry on the Conventions signed at the Hague when war broke out between Great Britain and the Boer Republics, and that had hardly been concluded when Russia, at whose instigation the Conference had been called, was engaged in a long and sanguinary war with one of the Signatory Powers of the Final Act, a war which made a profound change in the European situation and whose effects are still being felt in a marked degree. The Second Peace Conference of 1907 was followed in less than two years by a breach of the treaty of Berlin by one of the Signatory Powers whose success was assured by the support of another, and now we see a further breach of the same Treaty and war between two more of the Powers parties to the same Treaty. The Balance of Power in Europe has been upset for the time being, and until it is restored and international confidence and respect for international law re-

established, circumstances appear to point to the continuation of the present condition of international unrest. The European equilibrium is certainly capable of being again established by peaceful methods, as it has been more than once in the past; that such may be the solution of the present international situation is I am sure the wish of every Englishman. Fashoda was followed by the Anglo-French Entente Cordiale! Meantime let us face the facts, for to do this is far more likely to produce the desired pacific solution than sentimental aspirations for the dawn of the Millennium. A short time ago a French statesman (M. Clémental) observed that France, who in the past had cherished the illusion that dreams of universal peace might some day come true, had ceased to regard a European conflict as possible. "Three times within six years France," he said, "had been rudely awakened to the reality of things."

Certainly we should do all that in us lies to seek peace and ensue it, to encourage all the factors that produce peace, especially the growth of international confidence and respect for the aspirations and motives of other nations. Ignorance and want of insight may produce catastrophes the extent of which no one can foresee. War is a catastrophe, an evil of great magnitude,

how great, perhaps we, who have so long enjoyed freedom from invasion, can hardly understand.

Not all wars in the past have been wrong, and as long as violence, injustice, ambition, greed, bad faith and selfishness remain in human nature, so long is war unlikely to be removed permanently from the forces which make for the development of the world. There will remain for many a long year, I think, some questions which nations will not consent to submit to arbitration—would the United States, for example, submit the Monroe Doctrine to arbitration?—[1], and, as we have recently been reminded, situations may arise in the future in which the acceptance of peace would be felt by a nation to be an intolerable humiliation. In such circumstances a state would have no alternative but war in order to preserve its legitimate self-respect and dignity.[2] Arbitration

[1] "The national conviction, internal compulsion would not permit a government, in face of an immediate question to submit it to arbitration."—A. T. Mahan, *Some Neglected Aspects of War*, p. 83.

[2] On August 21, 1911, M. Vallé, who was M. Combe's Minister of Justice, said, "Peace can have no value in our eyes unless we at the same time preserve unimpaired our legitimate self-respect and our dignity. It would be far better to incur even the heaviest risks and to have to summon up all our energies than to lose one particle of so priceless a heritage."—*Times*, August 22, 1911.

is extremely valuable as a method for solving the majority of international disputes, but the preservation of the Balance of Power in Europe, and the maintenance of respect for international law can sometimes only be accomplished by more forcible means. Even the proposed Arbitration Treaty between Great Britain and the United States does not provide for the submission of all differences to arbitration, but only all disputes that are "justiciable," and it is left to a Committee of Inquiry to say whether a given dispute is justiciable in case the parties disagree, and should it decide in the negative, the states in dispute would be faced with war.

The speech of the Chancellor of the Exchequer at the Mansion House on July 21 last contained a summons to this nation to realize an important fact. No one will look to speeches of Mr. Lloyd George for Chauvinistic sentiments, but, in my opinion he did not only England, but the whole family of nations, a service when he drew attention to the fact that war has been in the past, and may yet be in the future, the only means by which the liberty of a people may be preserved or obtained.[1] In other words the Chancellor of

[1] "But I am also bound to say this, that I believe it is essential in the highest interest not merely of this country, but of the world, that Britain should at all hazards maintain

the Exchequer saw possibilities of situations when he would have to say "Britain will fight and Britain will be right." "The persuasion that War, as an inevitable factor in history, is a thing of the past," says Admiral Mahan, "is a public prepossession which will disappear as men study questions of international relations in their world-wide bearing: which very few do." We too often forget or ignore the teaching of history,

her place and her prestige amongst the Great Powers of the world. Her potent influence has many a time in the past and may yet be in the future invaluable to the cause of human liberty. It has more than once in the past redeemed Continental nations, who are apt sometimes to forget that service, from overwhelming disaster and even from national extinction. I would make great sacrifices to preserve peace; I conceive that nothing would justify a disturbance except questions of the gravest national moment. But if a situation were to be forced upon us in which peace could only be preserved by the surrender of the great and beneficent position Britain has won by centuries of heroism and achievement, by allowing Britain to be treated where her interests were vitally affected as if she were of no account in the Cabinet of Nations, then I say emphatically that peace at that price would be a humiliation intolerable for a great country like ours to endure. National honour is no party question. The security of our great international trade is no party question: the peace of the world is much more likely to be secured if all nations realize fairly what the conditions of peace must be."—Rt. Hon. D. Lloyd George, M.P., Chancellor of the Exchequer, at the Mansion House, July 21, 1911, as reported in *The Times* of July 22, 1911.

and the circumstances in which we live. "The tendencies of human nature as we know it in all times of history," said the late Lord Salisbury on the occasion of the first Colonial Conference in 1887, "teach us that where there is liability to attack and defencelessness, attack will come." [1] That truth has again received a striking illustration in Tripoli. We are all of us apt too readily to believe the thing to be which we desire. Some day possibly when nations forget their *motives* for war, and when the community of states is organized with all the completeness that some writers anticipate and advocate, the battle flags may be furled, and war may cease to be necessary, and be rendered impossible; but as things are, a state may still find itself compelled, as a last resource, to take up the sword for the maintenance of its existence, or of its national ideals of justice, honesty and honour, or for the redress of the wrongs of some downtrodden nation to whose appeals it feels bound to respond.

II

War is a contest carried on by force between the armed forces of states. If we open many continental works on International Law we shall

[1] See G. Peel, *The Friends of England*, Chapter viii, p. 171.

find that the authors quote with approval the doctrine promulgated by Rousseau,[1] and subsequently enunciated by Portalis in his speech at the opening of the French Prize Court in 1801 that war is a relation of state to state and not of individual to individual; and that between two or more belligerent nations, the private persons of whom those nations are composed are only enemies by accident, they are not so as men, they are not even so as citizens, they are only so as soldiers. War is certainly a relation between states, but if the latter part of the statement I have just quoted were true, I should have but little to say on the subject I have taken for my lecture. Rousseau's doctrine has never been accepted by British and American writers, and the history of all modern wars affords overwhelming evidence of its falsity. As it stands, the doctrine of Rousseau is an endeavour to distinguish individuals from the state which they compose, and to treat the state as something separate and apart from them, as a *Ding an Sich.* The doctrine to some extent owes its vitality to its forming a starting point for one of the arguments for the attack on a practice which has always been recognized as legitimate in maritime warfare, namely the capture

[1] *Le Contrat Social*, Book I, Chapter iv.

of so-called private property at sea; while it has also been appealed to by some of the great military Powers of Europe as affording a basis for their contention that the spontaneous rising of a population against an invader is a crime. The phrase, however, contains an element of truth, which has been the vital spark within it. It is a striking way of drawing attention to the fact that in modern times increased emphasis has been laid on the distinction between the combatant and non-combatant portions of the belligerent states. The saying of Rousseau is true only to this extent, that private citizens who refrain both in word and deed from taking part in hostilities will, with some important exceptions, now be left unmolested as regards their persons, and their lives and honour will be respected by the belligerent forces. It was in such a sense as this that M. Beernaert made use of Rousseau's dictum at the Second Hague Conference, when, supporting the proposal to abolish the practice of forcing the civilian population in an invaded country to act as guides to the enemy, he said that war was a relation between states and not between individuals, and therefore peaceful inhabitants must not be compelled to take part in it. In the wider sense which has often been attributed to it, the phrase is misleading, mischievous and untrue, and its falsity

will appear evident when we proceed to a more detailed examination of the laws and usages of war.[1] The Instructions for the Government of the armies of the United States in the Field contain the truer view of war. "Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civil existence that men live in political, continuous societies, forming organized units, called States, or nations, whose constituents bear, enjoy and suffer, advance and retrograde together, in peace and in war" (Art. 20). The "Instructions" then go on to point out that the citizen of a hostile country is an enemy as one of the constituents of the hostile state, and as such is subjected to the hardships of war. With the advance of civilization, however, there has grown up a distinction between the private individuals belonging to the enemy state and the armed forces, and the principle has been increasingly acknowledged that the unarmed person is to be spared in person, property and honour "as much as the exigencies of war allow," so that the inoffensive individual is as little disturbed in his private relations as the

[1] See on the subject, W. E. Hall, *International Law*, 5th Ed., pp. 63–70. L. Oppenheim, *Die Zukunft des Völkerrechts*, pp. 59–61. J. Westlake, *Chapters on International Law*, pp. 258–264.

commanders of the hostile troops can afford to grant in the overruling demands of a vigorous war.[1]

War, however, is not a condition of anarchy; contests between states are regulated by the laws of war, and much has been done in recent times to bring about a uniformity in regard to the legitimate practices of war. The Instructions issued to the United States Armies in 1863 which were prepared by Dr. Francis Lieber mark an important stage in the movement towards a more complete statement of these rules. They were issued again without modification for the government of the armies of the United States during the war with Spain in 1898.[2] They were of considerable value to the Conference at Brussels in 1874, when an attempt was made to obtain a declaration of the laws of land warfare acceptable to the Powers of the world. The Brussels Conference did not succeed in this, but the Declaration which it drafted was in nearly all its essentials accepted by the First Hague Conference in 1899, and is the basis of the "Regulations" annexed to the Convention on the Laws and Customs of War on land. These Regulations were amended

[1] See Articles 20–25 of the "Instructions for the Government of Armies of the United States in the Field."

[2] G. B. Davis, *Elements of International Law*, p. 505.

by the Second Hague Conference in 1907 and the Convention to which they are annexed has been signed by nearly all the Powers in the world.[1] The object of these Regulations was strikingly put by the distinguished Russian Plenipotentiary and Publicist, M. de Martens. They are, he said, to provide Statutes for a Mutual Insurance Society against the abuse of force in time of war, with the object of safeguarding the interests of populations against the greatest disasters which could happen to the ordinary populations in time of war. The emphasis laid on their importance in regard to the civilian population is noteworthy. The Powers who are parties to the Convention agree to issue to their armed forces instructions which shall be in conformity with the Regulations (Art. 1), and any belligerent party which violates their provisions is liable to make compensation, and is responsible for all acts committed by persons forming part of its armed forces (Art. 3).

Besides the Regulations annexed to the Hague Conventions, the Geneva Conventions of 1864 and 1906—to which also nearly all states are parties—regulate the treatment of the sick and

[1] For texts of these Conventions see A. Pearce Higgins, *The Hague Peace Conferences*, pp. 206–272; for the Brussels Draft Declaration (with cross references to the Hague Regulations), see *Idem*, p. 273.

wounded in land warfare, and a Convention entered into at the Hague Conference of 1907 applies the same principles to naval warfare. There are but few international agreements on the subject of the conduct of war at sea as between the belligerents themselves. The Declaration of Paris of 1856 exempted from capture enemy goods on neutral vessels, and neutral goods on enemy vessels, abolished privateering and required blockades to be effective in order to be binding, but with the exception of some isolated matters in regard to naval warfare which are dealt with by the Hague Conference of 1907 the conventional laws regarding hostilities at sea are much less definite and complete than those for land warfare. The Declaration of London, if and when it is ratified, will govern relations between belligerents and neutrals only.

International agreements however form only a part of International Law, and the preamble to the Convention on the laws and customs of war on land recognizes the incompleteness of its provisions, and states that until a more complete code of the laws of war can be issued, the High Contracting Parties think it expedient to declare that "in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and the rule of the

principles of the law of nations as they result from the usages established between civilized nations, from the laws of humanity and the demand of the public conscience." The written laws of war must therefore be supplemented by the rules of customary International Law, the evidence of which is to be sought in the works of International lawyers, while the facts on which those rules are based are to be found in historical, judicial and diplomatic records. All of these rules are to be observed in the spirit of humanity, which prohibits the infliction of needless suffering to individuals and mere wanton destruction of property, and to be enforced with the knowledge that the enlightened conscience of the world demands their observance in a spirit of good faith and honourable adherence to international agreements. Recent wars testify to the restraining force of the rules of International Law.

One fundamental principle on which I wish to lay great emphasis stands out from what has just been said, and it is this, that all is not fair in war. The international conventions I have referred to, and the usages of nations for a century past, prove conclusively the falsity of the popular saying. Great restrictions have been imposed on the unlimited power of a belligerent in regard both to the combatant and non-combatant mem-

bers of the enemy state. The rule that "the right of belligerents to adopt means of injuring the enemy is not unlimited" [1] has received almost universal acceptance. The amount of violence which is permitted to a belligerent by the laws of war is that which is necessary to enable him to attain the object desired, and the natural end of the art of war, says Clausewitz, the great master of strategy, is the complete overthrow of the enemy. In other words, a belligerent who wishes to bring his war to a successful termination may bring such pressure to bear on his adversary—that is, primarily on the armed forces of his adversary, but incidentally and often directly also on the civilian population—as will bring about the complete submission of the enemy as quickly as possible, and with the smallest possible expenditure of blood and treasure. "War means fighting," said the great Confederate General Stonewall Jackson. "The business of the soldier is to fight. Armies are not called out to dig trenches, to throw up breastworks, to live in camps, but to find the enemy and to strike him; to invade his country and do all possible damage in the shortest time. This will involve great destruction of life and property while it lasts, but such a war will of necessity be of brief duration, and so would be an eco-

[1] Article 22 of the Hague Regulations for Land Warfare.

nomy of life and property in the end. To move swiftly, strike vigorously, and secure all the fruits of victory is the secret of successful war." [1] And these views were more concisely stated by the American Instructions: "The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief." But all this must be subject to the qualification that it be done in accordance with the rules of International Law, both customary and conventional, rules which have come into being chiefly under the guidance of military commanders themselves, and have been dictated by the necessity for the due maintenance of discipline, by humanity and regard for the public opinion of the civilized world. "Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another, and to God." [2]

III

One result of our long immunity from invasion —an immunity which I trust may long continue— has been to create a feeling among us that we have no personal interest in war as individuals. It is astonishing how soon we forget even such events

[1] G. E. R. Henderson, *Stonewall Jackson and the American Civil War*, vol. i, p. 176.

[2] Article 16 of United States "Instructions."

as the black weeks of December 1899. Then, though thousands of British households throughout the Empire had sad occasion to know that war meant the death or mutilation of some of their members who were fighting in the ranks of the army, still, the great mass of the civilian population of these islands only felt the pressure of war in an impersonal or indirect way. Their persons and property were not directly endangered. Our adversary had no fleet; invasion was out of the question. I shall therefore ask you, in order the better to appreciate what war may actually mean, to imagine that war has broken out between Great Britain and some Great Power, and then to endeavour to understand how this fact would be likely, under the present rules of International Law, to affect the non-combatant population. The subject is surely a fitting one for study by all students of Law, History, Economics and Political Science, for war has a most important bearing on the matters with which these sciences deal, and for all, whether students or not, it is, or should be, a matter of as great interest, as it certainly is of importance.

A question which has occasioned a great difference of opinion in modern times is the necessity for a declaration of war preceding hostilities. Practice has been far from uniform in this matter: in recent times there has been a tendency to resort

to the older order of procedure under which a formal defiance was made before hostilities commenced. The Russo-Japanese War, however, commenced without a preliminary declaration of war, and Russia on this account complained to the Powers of the action of Japan as constituting a gross act of treachery. I do not think the charge can be sustained, for after long negotiations, and before the first act of hostility on the part of Japan, the Japanese Minister informed the Russian Government that in view of the repeated delays to reply without intelligible reasons, and of the naval and military activities of Russia which they deemed irreconcilable with pacific aims, the Japanese Government had no alternative than to terminate the existing futile negotiations; that they reserved to themselves the right to take such independent action as they might deem best to consolidate and defend their menaced position as well as to protect their established rights and legitimate interests.[1] Here was a clear intimation in language which one would have thought could hardly have failed to be understood by diplomatists that Japan was about to commence hostilities, especially as the Japanese Minister left St. Petersburg after delivering this message.

[1] A. S. Hershey, *The International Law and Diplomacy of the Russo-Japanese War*, p. 69.

With a view of getting a definite rule accepted by the Powers, the subject of the necessity of a declaration to precede the outbreak of hostilities was included in the programme of the second Hague Conference, and a Convention has been signed by all the important Powers, in which they recognize that hostilities must not commence without previous and unequivocal warning, which must take the form either of a declaration of war giving reasons, or of an ultimatum with a conditional declaration of war.[1] Does this Convention then preclude the possibility of a surprise attack? I do not think so. The Declaration, or presentation of the ultimatum may be followed so closely by the outbreak of war as to afford but little warning. The Conference rejected an amendment providing that the very moderate interval of twenty-four hours should elapse between the delivery of the Declaration and the commencement of hostilities. Hall, in discussing the question long before the Hague Conference, says, "the use of a declaration does not exclude surprise, but it at least provides that notice shall be served an infinitesimal space of time before a blow is struck. . . . The truth is," he adds, and the observation is very pertinent to the construction of this Convention, "that no

[1] For text of Convention and discussions see *Hague Peace Conferences*, pp. 198–205.

forms give security against disloyal conduct, and when no disloyalty occurs states always sufficiently well know when they stand on the brink of war." [1]

War may in the future, as in the past, come with extraordinary suddenness, and the rapidity with which it may break out is strikingly seen by the commencement of the war of 1870 between France and Germany. I quote the facts from General Sir Frederick Maurice's *Hostilities without Declaration of War*." [2] Lord Granville on taking office as Foreign Secretary spoke as follows in the House of Lords on July 11, 1870 :—

" I had the honour of receiving the seals of the Foreign Office last Wednesday. On the previous day I had an unofficial communication with the able and experienced Under-Secretary Mr. Hammond, at the Foreign Office, and he told me, it being then 3 or 4 o'clock, that with the exception of the sad and painful subject about to be discussed this evening, [the capture of Englishmen by Greek brigands] he had never during his long experience known so great a lull in foreign affairs, and that he was not aware of any important question that I should have to deal with. At 6 o'clock that evening, when we were about to begin the discussion on the Report of the Irish Land Bill, I received

[1] W. E. Hall, *International Law*, p. 384.

[2] p. xii.

a telegram informing me of the choice which had been made by the Provisional Government of Spain, of Prince Leopold of Hohenzollern, and of his acceptance of the offer."

Lord Granville goes on to explain how this incident, "arising *two hours after* Mr. Hammond's report, had led to 'strong language,' used *at once* by the French Government to the Prussian, and the existence of a strong and excited public opinion in France." Three days afterwards the Benedetti incident occurred.

On July 19, war was formally declared.

"The whole period, therefore, between Mr. Hammond's statement and the incident which so raised French passions that war from that moment was always inevitable, was *two hours*. The whole period between Lord Granville's statement and the formal declaration of war was eight days."

There is surely a most important lesson to be learnt from the outbreak—with such apparent suddenness—of the Franco-Prussian War. There seems little or no doubt that Prussia had prepared carefully and secretly in view of the possibility of war from the time when peace had been concluded with Austria in 1866; there seems little doubt that Napoleon the Third also had determined sooner or later to fight Prussia. But the French preparations were incomplete, their plans were

not matured, there was an absence of strategical thought and foresight, and though the French fought with a bravery worthy of their traditions, they paid the fatal penalty for neglect of preparations in time of peace. There was no lack of men, but officers trained to war were wanting, and neither officers nor soldiers can be produced on the spur of the moment, no matter how full of patriotism the manhood of the nation may become when it sees the invader actually within its native land. The Germans realized that "the date of the declaration of war is a purely strategical question. It is a matter of grave moment; it spells the difference between victory and defeat." [1] The actual declaration of war in this case came from France, but political considerations were made use of by Germany in order to allow strategical ones to come into play. She was ready and knew it, and two words put her forces into motion.

The outbreak of the Turco-Italian War was even more sudden than the Franco-Prussian. On September 25, 1911, the world first heard of serious complaints by Italy against Turkey. On September 28, an Italian Ultimatum was presented, and next day Turkey replied in a pacific sense, and that day at 10 p.m. Italy declared war and com-

[1] C. Ross, *Representative Government and War*, pp. 54, 81.

menced hostilities. In this case there were only five days between the first public notice of the existence of serious grievances and the outbreak of war.[1] It will not improbably be found, when all the facts are known, that strategical considerations were in this case the determining factors of the date of declaration of war. If a state is determined on war it will seize the moment it thinks most advantageous for making its formal declaration.

During the course of the discussions on this Convention at the Hague in 1907 the Chinese plenipotentiary asked the question as to what was to happen if one state declared war and the other did not want to fight. The answer is at present provided by the situation in Tripoli. In all discussions on war it must always be remembered that often one of the two disputing states does not want to fight, but that does not necessarily produce a pacific solution. No one, for example, in this country wishes to go to war with any foreign nation, but that desire is not enough to ensure a continuation of peace. We frequently say that it takes two to make a quarrel, but we forget the fable of the wolf and the lamb.

[1] See Sir T. Barclay, *The Turco-Italian War and its Problems*, Chap. iv., and Dr. Dillon in *The Contemporary Review*, November 1911.

On the outbreak of war intercourse between the citizens of our state and those of the enemy must cease; diplomatic agents and consuls will be withdrawn; some treaties are at once annulled, others suspended, while those regulating the conduct of hostilities come into force. Subjects of the belligerents travelling or resident in the enemy country will probably be allowed to continue their residence unmolested so long as they do nothing hostile to the state, or they may be permitted to return by a neutral route unless they are state officials, officers or members of the armed forces of the nation, though in case of military necessity even private citizens may be expelled on short notice, as has been done in several of the wars of the past half century. All commerce between British subjects and the subjects of the enemy state without special licence must at once cease, contracts are suspended and partnerships dissolved. So at the very commencement, the private citizen will be made to feel that war is a fact which not only concerns the armed forces of the belligerent states, but has an intimate relation to his own life.

Merchant ships of a belligerent which happen to be in the ports of the enemy at the outbreak of war may be allowed to depart after a few days of grace (Russia only allowed forty-eight hours to

Japanese ships in Russian ports). The Hague Convention 1907, No. 6, only goes so far as to say that it is *desirable* that such ships should be allowed to depart freely, either immediately, or after a sufficient term of grace, and to proceed direct to a given destination after being furnished with passports.[1] There has been a practice for the past fifty years to grant days of grace, and this will probably be continued, though states will be guided in this matter by due regard to their own national interests and a desire not unduly to hamper neutrals whose commerce might be interfered with by the detention of enemy ships laden with neutral goods. The belligerent may however detain his enemy's merchant ships till the termination of war, but may not confiscate them, but no compensation will be paid to the owners unless they are made use of for transports or any other purpose, then compensation must be paid. Still, mere detention would inflict grievous loss on shipowners. All merchant ships of a belligerent on the high seas, which are met by an enemy cruiser when their captains are still ignorant of the outbreak of war are liable to be seized and detained till the end of the war, without compensation; they may, however, be requisitioned for the use of

[1] For text of Convention and Commentary see *Hague Peace Conferences*, pp. 294–307.

the enemy, or even destroyed, but in this case due provision must be made for the safety of persons on board and the preservation of the ship's papers, and compensation is to be made to the owners. Germany and Russia do not accept this Article of the Convention, so should we be at war with either of these Powers they are not under an obligation to make compensation for British merchant ships which their cruisers meet at sea in ignorance of the outbreak of the war and which they destroy, neither should we be liable to pay compensation to their ship-owners if we destroyed any of their merchant vessels under similar circumstances. Merchant ships "whose construction indicates that they are intended to be converted into ships of war" are exempted from the provisions of this Convention; they are as liable to be seized and confiscated, whether in port or on the high seas, as before. There is in my opinion considerable doubt as to what ships are included under this head.

Besides merchant ships in the port of the enemy at the outbreak of war, and those which are met on the high seas in ignorance of hostilities, coastal fishing and small trading vessels and those engaged on scientific or charitable purposes are also exempt from capture so long as they refrain from all acts of hostility. All other merchant

ships are liable to capture and confiscation, together with all the goods on board them which are the property of enemy subjects, with one very important exception: "the postal correspondence of neutrals or belligerents, whether official or private in character, which may be found on board a neutral or enemy ship at sea is inviolable," and "if the ship is detained, the correspondence is forwarded by the captor with the least possible delay." [1] The Declaration of London contains a prohibition of the transfer of a ship by a belligerent owner to a neutral after the outbreak of war, and all transfers within two months before the war begins are liable to be viewed with suspicion by the captain of a cruiser visiting ships which have within that time ceased to be the property of subjects of his enemy.[2]

There is no international agreement on the subject of the conversion of merchant ships into ships of war on the high seas; [3] we may therefore

[1] Eleventh Hague Convention, 1907. Art. 1. See *Hague Peace Conferences*, pp. 396, 401.

[2] Chap. v. of the Declaration of London, see *Hague Peace Conferences*, pp. 559–60, 600–2. Transfer to a neutral flag is not rendered invalid by English law merely because it was made during or in contemplation of hostilities, but the onus of proving that the transfer was genuine lies on the claimant.

[3] See Report of Drafting Committee at the London Naval Conferences, *Hague Peace Conferences*, p. 571.

find an enemy's fleet augmented at the outbreak of war by the conversion into commerce destroyers of fast merchant ships.[1] A few of these, at the beginning of war, taking up their position in distant parts of the world, or on the main trade routes to our Islands, might, in the absence of adequate protection by the Navy of the many highways of commerce, do such an amount of damage to commerce and food supplies that prices would rise, famine be threatened and even partially experienced, and such a panic produced in the country as seriously to hamper the Government in their prosecution of the war. We have made no provision for storage of food supplies in time of peace which could be made available in war-time to reduce the misery caused by a temporarary cessation of supplies. The Royal Commission on the supply of food and raw material in time of war believed that about seven weeks' food supply could be kept in reserve at the annual cost of £100,000. Our mercantile marine might even be paralysed by the sudden rise in insurance rates during the first weeks of a war, for we have no national guarantee for the war risks of shipping.[2]

[1] The conditions subject to which conversions may be effected are set forth in the Seventh Hague Convention, 1907, see *Hague Peace Conferences*, 308–321 ; also see *post*, pp. 131–135.

[2] I have taken extreme cases, for I am dealing with *possibilities* and not estimating *probabilities*.

Belligerents have a right by the customary rules of International Law to sink the merchant vessels of their enemy whenever military necessities demand, including cases where the captor cannot spare a prize crew without endangering his own ship's safety. In all cases the passengers and crew must be first removed; but it may often happen that there is no spare ship on which they can at once be placed, and then they will find themselves on the enemy's cruiser which, even if it be one of the largest type, is but ill-equipped for their reception. Until the captor can get rid of them, either by transfer to a passing neutral merchantship, or by landing them at a neutral port, they remain exposed to the dangers of a naval engagement. This is a risk to which both enemy and neutral subjects on an enemy passenger-vessel are exposed, and they are liable to it even though when they started on their voyage, the whole world was at peace.[1]

It was formerly a rule of customary International Law that the officers and crews of all captured merchant vessels were liable to be made prisoners of war, but the principle of distinguishing between combatants and non-combatants which obtains in land warfare has now been applied to naval warfare. The Eleventh Hague Convention

[1] See *post*, pp. 71–87.

of 1907 provides that the members of the crew of an enemy merchant ship who are subjects of neutral states are not to be made prisoners of war, but the officers must promise in writing not to serve on an enemy ship while the war lasts, and the officers and crew who are members of the enemy state are also not to be made prisoners of war if they promise in writing not to engage, while hostilities last, in any service connected with the operation of war.[1]

Let us now assume that our adversary should obtain, even for a short time, the command of the sea.—How seldom does the ordinary British citizen realize how vital it is that our Navy should obtain and retain it at the earliest moment, for the British Empire depends on the British Navy.—If the Declaration of London be taken as a guide we should find that neutral ships carrying to our shores contraband of war, including under this head foodstuffs destined for the use of our armed forces, or for a Government department or consigned to our Government authorities, or to a contractor who as a matter of common knowledge supplies articles of this kind to our Government, or which are consigned to any of our fortified places or other place serving as a base for our armed forces would be captured. Such vessels and their cargoes of foodstuffs and other contra-

[1] Articles 5–8, see *Hague Peace Conferences*, pp. 397, 405.

band would also if the contraband, reckoned either by value, weight, volume or freight form more than half of the cargo, be liable under certain circumstances to be destroyed,[1] and destruction would have a serious effect on neutral ship-owners, and also on our civilian population. British ships would of course be liable to capture irrespective of the character or destination of the cargo.

If our adversary were sufficiently strong at sea he might declare a blockade of some of our coasts and ports and endeavour to prevent not only munitions of war and foodstuffs but every article of commerce from entering the blockaded area in neutral ships. What the effect of this would be on the civilian population can hardly be conceived: the cessation of the cotton supplies from the United States when we were not at war, occasioned by the blockade of the cotton-growing states during the American Civil War produced famine and misery for millions.

Again, bombardment of coast towns by a belligerent fleet is an operation of war of supreme interest to civilians, for even if only ports of naval equipment such as Chatham, Devonport or Portsmouth were bombarded they would be certain to suffer both as regards persons and property, but

[1] See Article 30–35, and 48–54 of the Declaration of London, *Hague Peace Conferences*, pp. 550, 559.

undefended coast towns such as Brighton or Eastbourne might under certain circumstances also be bombarded. The bombardment of naval forces in time of war forms the subject of the Ninth Hague Convention of 1907. This convention has received practical interpretation during the present war between Italy and Turkey. It commences by recognizing the immunity from such bombardment of undefended ports, towns, villages, dwellings or buildings; but such places must be really undefended. Great Britain, France, Germany and Japan very rightly refuse immunity to places where mines are placed off the harbours. Further, if in any coast town there are military works, military or naval establishments, depôts of arms or war material, workshops or plant which could be utilized for the needs of the fleet or army—a very wide expression—or if in the harbour of such town there happens to be any warship, all these may be destroyed by the guns of the enemy's fleet, even though some of them should be the property of private persons, unless after notice the inhabitants themselves destroy them. This destruction by bombardment might be effected even without any previous warning, if military necessities (which would mean in such case the opinion of the commander) rendered such a proceeding necessary. The commander incurs no liability for

any unavoidable damage which may be caused to the town or the civilian population by the bombardment, but he is under a duty to take such precautions that the town itself may suffer as little as possible. Even if a coast town contains no works or stores capable of being utilized for the navy or army or ships of war in harbour, if the commander of a naval force of the enemy sends an officer and boat's crew ashore and orders the inhabitants to provide provisions or supplies, food or fuel for use of his men or ships before the port and the town cannot or will not comply with the demand, then after due notice he may bombard the place. The Convention states that the requisitions are to be proportional to the resources of the place, but this question is left to the ultimate decision of the commander of the naval forces. The inhabitants themselves may be pinched by hunger or cold, and wholly unable to satisfy the demand, but to these horrors may be added the terror of bombardment and the destruction of their homes if they fail to produce the supplies asked for. The bombardment of undefended seaport towns for non-payment of contributions in money is forbidden.[1]

[1] For text and commentary on the Convention see *Hague Peace Conferences*, pp. 345–357.

The following extract from the *Giornale d'Italia* quoted by

IV

And now, having seen what may be the results of war to private citizens in regard to naval operations, I wish to make a further draft on your powers of imagination and to ask you to contemplate the possibility of an invasion by the enemy's army, or if you prefer it, you may take the case of a British army landed on the shores of our imaginary adversary.

It is the modern practice when an army invades the enemy's territory for the commander to issue a proclamation addressed to the inhabitants announcing that he is making war only against the soldiers and not against private citizens, and that so long as the latter remain neutral, and make no hostile attempts against his troops, he will, as far as possible, spare them the horrors of war, and per-

The Times of January 22, 1912, as to the effect of a naval bombardment speaks for itself. "By evening Zuara wore the aspect of a town visited by an earthquake. It seemed a tomb. No smoke showed any life remained in its houses." On February 25, 1912, an Italian squadron surprised a Turkish gunboat and torpedo-boat in the port of Beirout. The Italian commander gave them a short time in which to surrender, and receiving no reply proceeded to bombard both vessels. Some damage was done to the town in the course of the bombardment. The Italian Admiral appears to have complied with the terms of the Convention. (See *The Times*, Feb. 26, 1912.)

mit them to continue to enjoy security for person and property. It is one of the greatest triumphs of civilization to have brought about the distinction between the treatment of combatants and non-combatants. Private citizens are no longer murdered, enslaved or carried off to distant parts, nor exposed to every kind of disturbance of private relations. The credit for this alteration of treatment is due in the first place to belligerent commanders themselves, for they alone had and have the power to enforce the rules which have grown up ameliorating the condition of the peaceful citizen. Self-interest has played a by no means unimportant part in bringing about this change; commanders discovered that by giving protection to the civilian population, by buying their provisions instead of plundering them wholesale, better discipline was preserved among their own troops, and greater freedom for their operations was ensured. Yet even now the lot of the private citizen in an invaded territory is far from being a happy one.

In order that the civilian population may receive such improved treatment it must remain strictly non-combatant and refrain from all intermeddling in hostilities. Full belligerent rights are accorded (I) to the armed forces of the belligerent state, including under this designation those in the

regular army, volunteers, territorial troops and such irregular troops as comply with the requirements of the first Article of the Hague Regulations. These conditions are that such forces (*a*) must have at their head a person responsible for his subordinates; (*b*) they must have a fixed, distinctive badge recognizable at a distance; (*c*) must carry arms openly, and (*d*) conform in their operations to the laws and usages of war. The armed forces complying with these requirements (some of which, especially the use of a distinctive badge, are equivocal) always have attached to them a certain number of non-combatants to whom also belligerent rights are granted, such as telegraphists, veterinary surgeons, canteen-contractors and others. They fight if necessary and should be included under the term combatants, though Article 3 of the Hague Regulations designates them as non-combatants.

Belligerent rights are also granted (II) to the population which rises in arms at the approach of an invading army in an unoccupied territory; such persons if they take up arms spontaneously in order to resist the invading troops, without having had time to organize in conformity with the first Article of the Regulations are to be considered as lawful belligerents if (*a*) they carry arms openly and (*b*) observe the laws and usages of war. This

recognition of the right of a whole population to rise *en masse* and defend itself against an approaching invader was obtained only after strenuous contention on the part of Great Britain and some of the smaller states of Europe. For the great military Powers, which have adopted universal military service in some form or another, the question of granting this recognition had not the importance that it possesses for other states such as our own, where the great mass of the manhood of the nation has received no military training. As it is the Article still seems defective. There will remain the difficulty of distinguishing between such levies *en masse* and sporadic outbreaks in unoccupied districts in the absence of a commander responsible for the acts of his subordinates. The German General Staff in its official work on the laws of land warfare states that the demand for subordination to responsible heads, for a military organization, and for distinctive marks, cannot be given up without engendering a strife of individual against individual which would be a far worse calamity than anything likely to result from the restriction of combatant privileges.[1] This question is by no means settled. One fact, however, is clear, the belligerent character only

[1] *Kriegsbrauch in Landkriege*, pp. 7–8 ; J. M. Spaight, *War Rights on Land*, p. 55.

attaches where the rising is one of considerable dimensions. Cases of isolated defence by individuals of their homes are left outside these regulations. The citizen who committed acts of hostility without belonging to a force complying with the requirements of the Hague Regulations would find himself dealt with as severely as was Mr. Browne in *An Englishman's Home*, who for defending his house against the invaders of the "Nearland" Army was taken and put to death before it. Men and squads of men not under strict discipline, not forming part of the army or of a levy *en masse*, at the approach of the invaders, who commit hostile acts with intermitting returns to their homes and vocations, divesting themselves of the character or appearance of soldiers, have no cause for complaint of an infringement of the laws of war if when they are caught they are denied belligerent rights, and put to death.

None of the Regulations referred to affect the treatment of risings by the inhabitants in territories occupied by the invading army. The customary rule of International Law is that all such persons are liable to the severest penalties. "War rebels," says Article 85 of the American Instructions, "are persons within an occupied territory who rise in arms against the occupying or conquering army or against the authorities estab-

lished by the same. If captured, they may suffer death, whether they rise singly, in small or large bands or whether called upon to do so by their own, but expelled, Government or not." [1]

There is however another case in which private citizens have often been granted the rights of belligerents (III) namely where they have assisted the army of defence of a besieged town. The historic defence of Saragossa, in which even the women assisted the gunners, and the more recent defence of Plevna, afford examples of such treatment.

So long therefore as non-combatants refrain from direct participation in the war they are immune from direct violence, but they are liable to personal injuries which may result from the military operations of the armed forces of the belligerents. Among such operations are bombardments which accompany the sieges of defended towns. The Hague Regulations lay down certain rules for the general guidance of officers in conducting sieges. The attack or bombardment by any means whatever—this includes dropping

[1] Of the treatment by the Italians of the Arabs in the Oasis of Tripoli in October, 1911, I say nothing, as there appears at present to be a hopeless contradiction in the reports in the Press. There seems, however, to have been a rising in occupied territory which is always severely dealt with.

shells from balloons and airships—of *undefended* towns, villages, houses and dwellings is forbidden (Art. 24). The commander of the troops attacking a defended town before commencing a bombardment, except in the case of assault, must do all that lies in his power to give warning to the authorities (Art. 25). In sieges and bombardments, every precaution is to be taken to spare, as much as possible, buildings devoted to religion, art, science and charity, historic monuments, and hospitals and places where the sick and wounded are collected, provided that they are not used at the same time for military purposes. The besieged is to indicate these buildings or places by some special visible sign, which is to be previously notified to the assailants (Art. 27).[1] The pillage of a town or place, even when taken by assault, is prohibited (Art. 21). This last prohibition marks a great advance in the customs of war, and with one or two exceptions due to special circumstances has been well observed in modern times.

The siege and bombardment of a town is an

[1] In case of bombardment by naval forces there is a similar injunction to the commandant to spare such places. The duty of the inhabitants is to indicate these buildings by special signs consisting of large, rectangular rigid panels, divided along one of their diagonals into two coloured triangles, black above and white below. 9 H.C., 1907, Art. 5. (See *Hague Peace Conferences*, p. 356.)

operation of war which bears most cruelly on the ordinary civilian population; the private citizens who are living in their own homes and who generally are not allowed to leave, even if they should wish to do so, are subject to all the dangers of falling shot and shell, and not infrequently their houses are directly bombarded by the assailant in order to bring pressure to bear on the commander of the besieged town so that he may be induced, by the sufferings of the inhabitants, to surrender. It must be noticed that it is only *undefended* towns which may not be bombarded. The distinction is not between fortified and unfortified places. Modern engineering skill has shown the futility of endeavouring to draw such a distinction. Plevna, till Osman Pacha threw himself into it with his army was as open a town as any English country-town to-day. Ladysmith, Mafeking and Kimberley were all unfortified till the British troops took in hand their defences.

The injury which may be inflicted on private citizens by bombardments may be illustrated by the bombardment of Strasburg by the Germans in 1870, when 448 private houses were utterly destroyed, nearly 3,000 out of a total of 5,150 were more or less injured, 1,700 civilians were killed or wounded, and 10,000 persons rendered

homeless; the total damage to the city was estimated at nearly £8,000,000.[1] The great damage done to Strasburg was chiefly due to the fact that the forts and ramparts were so close to the town that they could not be shelled without damaging the houses, but there appears to be little doubt that the bombardment was, at times, intentionally directed against the private houses with a view of bringing pressure to bear on the civilian population. Such a practice—attacking those who cannot defend themselves—certainly appears to be contrary to the principle of modern warfare, and bombardments to produce psychological pressure cannot be excused, says Hall, and can only be accounted for as a survival from the practices which were formerly regarded as permissible, and which to a certain extent lasted till the beginning of the nineteenth century. "For the present," he adds, "it is sanctioned by usage," [2] and in every war since 1870, whether by inevitable accident or design, considerable damage has been done to the persons and property of ordinary peaceful citizens.

With the progress of aeronautics we shall probably see a further terror added to war, as it seems

[1] J. M. Spaight, *Op. cit.*, p. 162, H.M. Hozier, *Franco-Prussian War*, vol. ii., p. 71.

[2] *Op. cit.*, p. 537.

that in the future Tennyson's prophecy will be fulfilled in which the Poet:

"Heard the heavens fill with shouting, and there rained
a ghastly dew
From the nation's airy navies grappling in the central blue."

With the exception of Great Britain and Austria no great European Power has signed the Declaration agreed to at the Hague Conference in 1907, which prohibits, till the close of the Third Peace Conference, the discharge of projectiles and explosives from balloons and airships.[1] It is, in my opinion, a lamentable commentary on the humanitarian sentiments so freely expressed by the delegates at this Conference, that this splendid opportunity of making a beginning in the limitation of military budgets, the increase of which they all so loudly deplored, was thus lost.

Before leaving the subject of bombardments, a few words are necessary in regard to the question of allowing what are called "useless mouths"—

[1] See *Hague Peace Conferences*, pp. 482–491. All the Powers have agreed that undefended towns, etc., are free from bombardments "by any means whatsoever," which words were inserted to include the discharge of projectiles from airships (see *Hague Peace Conferences*, p. 490 and Note 4 on the same page as regards bombardments by naval forces). Though Great Britain and Austria have signed the Declaration against discharging projectiles from balloons, this is only binding in case of war with other Powers signatory of the same Declaration.

(*les bouches inutiles*) that is, old men, women and children—to leave a besieged town. The Hague Regulations are silent on the point. The notice which a commander is required to give before bombardment—though no period of delay is fixed—is some protection for the non-combatants, and such notice is clearly demanded by every requirement of humanity so as to enable some measures to be taken for the protection of the civilian population, especially women and children ; but beyond this the Regulations are silent. There is no obligation imposed on the besieger, either by the written or unwritten laws of war, to allow any portion of the population to leave a besieged place even when a bombardment is about to commence. "When the commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender," [1] and instances of this have occurred in modern times. The whole matter is solely one for the commander of the besieging force, though when the intention is to take the town by assault, not to reduce it by famine, the retention of the civil population within the town

[1] United States "Instructions," Article 18.

means the infliction of much unnecessary suffering. The Japanese gave permission to the civilian population to leave Port Arthur before the bombardment, but throughout the Franco-German war, except when General von Werder granted a short armistice for some Swiss delegates to remove 2,000 homeless women and children from Strasburg, the Germans observed the full rigour of their war rights. The Americans before bombarding Santiago de Cuba in June 1898, gave forty-eight hours' notice and allowed the exit of non-combatants. In the siege of Ladysmith, although non-combatants were not allowed to leave, an arrangement was made whereby they were placed in a camp outside the zone of fire, but they remained dependent for their supplies on the defenders of the besieged town. This subject, like so many connected with war, is one in which it is most difficult to harmonize military necessities and the dictates of humanity.

It is, however, as a rule, only a small proportion of the civilian population that is thus exposed to the danger of death or injury by direct military operations, but when a district is occupied by the invading army, every inhabitant feels the pressure of war. The object of the invader, apart from winning victories over his adversary's troops, is to make his superiority felt by the whole popu-

lation of the enemy state, and when the troops of the defenders have been expelled from a given area, and the territory is actually placed under the authority of the hostile army, an important legal change in the relation between the invader and the invaded takes place, as such territory is then said to be in the enemy's military occupation.

Until the middle of the eighteenth century, the invader treated the territory of his enemy as his own, but gradually the distinction between conquest and military occupancy was worked out, and by the end of the nineteenth century a series of rules was accepted and embodied in the Hague Regulations of 1899 and 1907. "Territory is considered to be occupied when it is actually placed under the authority of the hostile army. The occupation applies only to the territories where such authority is established and can be exercised" (Art. 42). It appears certain that under the Hague Regulations the practice pursued by the Germans in 1870 of deeming a whole canton of 72 square miles to be occupied if a patrol or small detachment passed through without resistance can no longer be justified. "Occupation on land is strictly analogous to blockade at sea; and as blockades are not recognized unless they are effective, so occupation must rest on

the effective control." [1] Practically occupation amounts to this, that the territorial Government can no longer exercise its authority within the area of invasion, and the invader can set up his own governmental organization or continue in office those of the expelled Government who are willing to serve. Recent wars provide us with examples of the working of the modern rules governing belligerent occupation which are contained in Articles 42–56 of the Hague Regulations.

The authority of the legitimate sovereign having been displaced, the occupant must take all steps in his power to reestablish and ensure public order and safety, while respecting, unless absolutely prevented, the laws in force in the country. A combination of severity and conciliation is required which will at the same time allow the peaceful citizen to continue the pursuit of his ordinary avocation, so far as possible, while the occupants' position is not endangered. Order is to be maintained, and existing laws enforced as far as circumstances permit. A military administration is in practice at once set up. The occupant issues notices prohibiting and punishing with severity all offences against the army of

[1] T. J. Lawrence, *International Law*, p. 433.

occupation, and every act which may endanger the security of his troops. (I have already referred to the severity with which risings in occupied districts are always dealt.) The commander orders all arms and ammunition of every description to be given up, closes the public-houses either wholly or partially, forbids the assembly of groups of men in the street, requires all shutters to be removed from shops, orders all lights to be put out by a certain time, establishes a censorship on all letters, suppresses or restricts the publication of newspapers, restricts individuals in their freedom of movement, deports any whose presence he may consider dangerous to his army, and in a thousand different ways makes the ordinary citizen feel that the enemy is within his gates. The following Proclamation issued by General von Kummer at Metz on October 30, 1870, gives in a few sentences an example of the powers of an occupant :—

"If I encounter disobedience or resistance, I shall act with all severity and according to the laws of war. Whoever shall place in danger the German troops, or shall cause prejudice by perfidy, will be brought before a council of war; whoever shall act as a spy to the French troops or shall lodge or give them assistance; whoever shows the road to the French troops voluntarily :

whoever shall kill or wound the German troops or the persons belonging to their suite; whoever shall destroy the canals, railways or telegraph wires; whoever shall render the roads impracticable; whoever shall burn munitions and provisions of war; and lastly, whoever shall take up arms against the German troops, will be punished by death. It is also declared that (1) all houses in which or from out of which any one commits acts of hostilities towards the German troops will be used as barracks; (2) not more than ten persons shall be allowed to assemble in the streets or public houses; (3) the inhabitants must deliver up all arms by 4 o'clock on Monday, October 31, at the Palais, rue de la Princesse; (4) all windows are to be lighted up during the night in case of alarm." [1]

The conversion into barracks of houses in which or out of which acts of hostilities had been committed was less severe than the treatment authorized by the British generals during the Boer war. Lord Roberts ordered the burning of farms for acts of treachery or when troops had been fired on from farm premises, and as a punishment for breaking up telegraph or railway lines

[1] H. M. Hozier, *Franco-Prussian War*, vol. ii. p. 124, cited by J. M. Spaight, *Op. cit.*, p. 338.

or when they had been used as bases of operations for raids.[1]

The rules issued by the occupant are rules of Martial Law and proceedings to enforce them are generally taken before a military tribunal. There is, I believe, a considerable misapprehension as to the meaning of Martial Law, not only among military officers but also among civilians. Martial Law might perhaps be more accurately called "Military rule," or the "Law of hostile occupation," as General Davis suggests.[2] It was described by the Duke of Wellington as "neither more nor less than the will of the general who commands the army. In fact, Martial Law means no law at all. Therefore the general who declares Martial Law, and commands that it shall be carried into execution, is bound to lay down distinctly the rules, and regulations, and limits according to which his will is to be carried out." It is not, therefore, a secret written code of law which a commander produces from his pocket and declares to be the laws under which an occupied territory is to be governed. Martial Law in a hostile country consists of the suspension of the ordinary rules of law in so far as such suspension

[1] *Parliamentary Papers*, 1900. Proclamations of F.-M. Lord Roberts, [Cd. 426,] p. 23.

[2] *Elements of International Law* (3rd ed.), p. 333.

is called for by military necessities, and the substitution of military rule and force for the ordinary laws either in whole or in part.[1]

The occupant is forbidden to place any compulsion on the inhabitants of occupied territory to take the oath of allegiance to him (H. R. Art. 45), but he may compel them to take an oath of neutrality, though even without this the inhabitants are under a duty of remaining neutral, and they forfeit their rights as non-combatants by any intermeddling in the war. The occupant must see that the family honour and rights, the lives of individuals and private property, as well as religious conviction and liberty of worship are respected; but liberty of worship does not mean liberty to preach sermons inciting to continued warfare or hostility to the occupant. Many churches were closed by British officers during the Boer war in consequence of the political character of the sermons preached therein. Private property cannot be confiscated (Art. 46). The occupant may, however, find it necessary to make use of churches or schools as hospitals, and

[1] For examples of Proclamations of Martial Law during the Boer War see Parliamentary Papers 1900, [Cd. 426], also Chap. xi. of Dr. Spaight's *War Rights on Land*. For a fuller treatment of martial law in relation to English law see A. V. Dicey. *The Law of the Constitution*, Chap. viii.

we shall shortly see that though private property must not be confiscated the occupant has a large licence in the matters of supplying his troops with all things needful for them. He may not confiscate, but he may commandeer. The occupant is also forbidden to interfere with the existing private rights of citizens of the occupied territory, for he must not declare to be extinguished, suspended or unenforceable in a court of law the rights and rights of action of the subject of the enemy state (Art. 23 (*h*)). There is some doubt as to the meaning of this prohibition, but this is the view which it is understood that the British Government takes as to its interpretation.[1]

The services of the inhabitants of the occupied territories may be requisitioned by the occupant, if they are of such a nature as not to involve them directly in taking part in military operations against their own country (Art. 52). The interpretation which commanders put on this limiting clause is a lax one, but professional men, tradesmen and artisans, for example medical men, chemists, engineers, electricians, butchers, bakers, smiths, etc., etc., may find that their services are de-

[1] On the meaning of this Article see *Hague Peace Conferences*, pp. 263–265; T. J. Lawrence, *Op. cit.*, pp. 358–360; T. E. Holland, *Law Quarterly Review*, vol. xxviii. (Jan., 1912), pp. 94–98.

manded by the commanding officer in the locality. Some authorities hold that the occupant may resort to forced labour for the repair of roads, railways and bridges, as such are required to restore the general condition of the country, even though their repair should mean a considerable strategic advantage to the troops of the occupying army. The belligerent is also forbidden, both in unoccupied and occupied districts, to compel the subjects of the other belligerent to take part in operations of war directed against their own country (Art. 23, last paragraph), and an occupant is also forbidden to compel the population of occupied territory to furnish information about his own country's army, or about his means of defence (Art. 44). The discussions on these articles at the Hague in 1907 make it clear in my opinion that these provisions forbid the impressment of persons to act as guides for the invading troops, and this view is supported by the Report made by the French Delegation to their Government. But all the Powers do not accept this latter Article. Austria, Germany, Japan and Russia excluded it, on signing the Convention, but even so I think the practice is condemned in Article 23. However, it is by no means improbable that some of these Powers, by making a reservation of Article 44 did so in order to adhere

to the practice, which has long obtained, of compelling inhabitants to act as guides to the invader's troops. This practice, and that of compelling men under threat of death to give information of military value, appear to me contrary to the whole spirit of the modern development of the laws of war; they are odious, and should disappear from all the military manuals of civilized states.[1]

We thus see that there are many cases in which the personal services of ordinary private citizens may be requisitioned in occupied territory; their property is also liable to be requisitioned for the use of the occupying army. In addition to the payment of the ordinary taxes which the invader may levy for the benefit of the occupied district, the inhabitants may also be called upon to pay contributions in money in lieu of requisitions in kind. There are no less than three different Articles in the Hague Regulations which either prohibit pillage or forbid the confiscation of private property, but military necessities, though not overruling the strict letter of the prohibition often bring about a situation which make these prohibitions sound unreal. Still they are exceptions, and the rule holds good. We have already seen that the actual destruction of private dwell-

[1] For discussions of these Articles see *Hague Peace Conferences*, pp. 265–268.

ing-houses and other buildings in private ownership may be occasioned by bombardment or other operations of war. But, in addition to destruction or damage caused by these means the landowner may be deprived of the use of his land for camps, for fortifications, for entrenchments, or for the burial of the dead. Commanding officers in actual warfare do not ask permission of landowners to make use of the land as battlefields and promise not to damage the crops or disturb the game, nor will the objection by fashionable watering places that military manœuvres interfere with summer visitors, receive any attention from the commander of an invading army. Houses, fences, woods are all liable to be demolished to provide materials for fortifications or to prevent the enemy from making use of them as cover, and landowners may never get any compensation where such destruction takes place as an operation of war. Further, private citizens are liable to have troops billetted on them or sick or wounded placed in their houses. In connexion with the requisitioning of the services of inhabitants to assist in the care of the sick and wounded, I may draw attention to the fact that the Geneva Conventions make no provision for the non-combatant inhabitants in districts where hostilities are in progress. "These unfortunates frequently suffer severely from sick-

ness and wounds in consequence of the military operations, and their case is then particularly distressing because they are generally without medical personnel or material for their proper treatment."[1]

Then as regards the personal property of the ordinary citizens, everything belonging to them which may be of direct use in war, such as guns, ammunition and all kinds of war-material are always taken from the inhabitants, and particularly heavy penalties are always inflicted for the concealment of arms. All appliances, whether on land, at sea, or in the air, adapted for the transmission of news or for the transport of persons or goods, apart from cases governed by maritime law, may be seized even though belonging to private persons, but they are to be restored and indemnities regulated at the peace (Art. 53). Restoration will in a vast number of cases be an impossibility, and the compensation may be but a poor substitute for the thing taken. Money is but a poor compensation to a farmer if all his horses are requisitioned. This article therefore authorizes the seizure of all kinds of transport: horses, motor-cars, motor-boats, carts, bicycles, carriages, tram-cars, balloons, aeroplanes, river pleasure-steamers,

[1] W. G. Macpherson, *The Geneva Convention, Zeitschrift für Völkerrecht und Bundestaatsrecht*, vol. v., p. 260.

canal barges and so forth—all may be seized by the occupant, as well as depôts of arms and all kinds of war material, from the farmer's sporting rifle to the contents of the Elswick, Krupp's or Creusot's Armament works. In all these cases the persons from whom articles are taken should obtain receipts so that they may have evidence on which to base their claims for compensation when the war is over. But besides all these articles, which are from their nature of direct use in war, the commander of an occupied locality can order the inhabitants to provide everything necessary for the needs of his army, such as food, wines, tobacco, fuel, cloth, leather, stirrups, chains for horses and artillery and transport-waggons, etc., etc. Such requisitions are to be paid for as far as possible in ready money, and the price may be fixed by the commander, or if payment is not made he must give receipts for whatever he takes (Art. 52). In this way the occupant may make the inhabitants of the occupied district contribute to the maintenance and upkeep of his army. The requisitions must be proportionate to the resources of the county, which means that the inhabitants are not to be left in a starving condition. In practice such requisitions are levied through the civil authorities, who will make representations if they consider the demands exorbitant; usually

in modern warfare the attitude of commanders has been commendably reasonable. It is good policy.[1]

It may often happen that a particular district does not possess the actual requirement of the army, whereas another does. In such cases the Commander-in-Chief levies contributions in money as far as possible in accordance with the assessments for ordinary taxes; the money thus raised from the whole district can be spent in that part which possesses the required article, and in this way the expense is spread over a wider area. Such contributions can only be levied for military necessities or for the administration of the territory, (Art. 49), the occupant is therefore forbidden to exact money payments for the purpose of enriching his own treasury, but he is not forbidden to levy money payments by way of punishment of breaches of the laws of war.

It is impossible in the space of a single lecture to show in further detail the various ways in which pressure may be brought to bear in almost every direction on the ordinary civilian population of an occupied or invaded district. I can say nothing of the hostages the invader may take to ensure the observance of the laws he has enacted, or of the

[1] See J. M. Spaight, *Op. cit.*, 405.

fines he may impose, the destruction of buildings he may order, or the other punishments he may inflict for the infringement of his regulations or by way of reprisals; all these matters are writ large on the pages of the histories of recent wars.

Neither can I speak of the treatment which public property will receive at the hands of the invader, except to lay down the general principle that as regards the state property in land and buildings of a non-military character, the occupant must regard himself as being an administrator and usufructuary. That is, the property must be used with care so that its substance remains uninjured. Similarly, property belonging to municipal bodies and all public buildings devoted to religion, education, charity, art, science and the like are to be treated as private property, and so must the moveable property of the state and provincial and municipal corporations except where it is of a character to be of use in war. Royal palaces, picture galleries, public libraries, museums and their contents would therefore be exempt from confiscation or injury. These subjects are however outside the scope of our inquiry. We are concerned with the private citizen.

I have now endeavoured to give some idea of the manner in which war affects the private citi-

zen both as regards his person and property, and we are led to the conclusion that Lord Brougham's dictum that "in the enlightened policy of modern times, war is not the concern of individuals but of governments" is very far from representing the whole truth. Much has been done during the past century to mitigate the horrors of war, particularly as regards the treatment of sick and wounded belonging to the belligerent forces, especially by the Geneva Convention of 1906, which for the first time gives an international recognition to the work of Red Cross Societies, provided they are under due control: the lot of the private citizen has also been ameliorated by the acceptance of a code of laws for land warfare, by the introduction of the practice of payment for goods requisitioned for the hostile army, the prohibition of pillage and the definite recognition by states of the duty to provide for the protection of family life and honour and by the increasing influence of the public opinion of neutral states. But when all these ameliorations are taken into consideration it remains evident that both in naval and land warfare the private citizen is still subject to great dangers and losses. Forced labour may be requisitioned, private property of every description can be commandeered for the use of the invading army, foodstuffs of all sorts compulsorily purchased, and several of

the most powerful military states still insist on retaining the right—one of the most objectionable of the usages of war—of forcing non-combatant individuals to act as guides to the army of invasion.

We may speak of the ameliorations of the lot of the private citizen which have resulted from the growing sentiment of humanity, we may congratulate ourselves on the legal limitations imposed on commanders by International Law, but when all is said, and every legal rule obeyed, can a stern and successful commander be prevented from bringing psychological pressure to bear on the civil population by carrying out the war-policy advocated by General Sherman in the following passage ?—"The proper strategy consists in the first place in inflicting as telling blows as possible on the enemy's army, and then in causing the inhabitants so much suffering that they must long for peace and force their governors to demand it. The people must be left nothing but their eyes to weep with over the war." "War means fighting" —but it means much more. It involves starvation and untold miseries to men, women and children who take no part in battles. It may be thought that I have painted the picture in too dismal colours, but I think that if the inhabitants of Tripoli, Cyrenaica or the Arabian coast towns were asked whether I have overstated the possi-

bilities of harm and danger to which they have been and are still exposed, their reply would be an emphatic negative.

V

In conclusion, I wish to say a few words on a subject on which there is a considerable difference of opinion in this country, and as it is of the greatest importance to us as an Island Power, I take this opportunity of putting forward certain conclusions which in my opinion follow from what has already been said. The treatment of private property on land, its so-called immunity from capture, is often used as an argument by those who advocate the abolition of the rule of capture of enemy merchant ships and goods at sea. This argument at any rate appears to be valueless in the face of the facts to which every modern man bears witness. With other aspects of this important question I am unable now to deal. A belligerent uses the private property of his enemy's subjects in such a way as he considers will best contribute to his ultimate object—the paralysis of the commercial life of the nation. The receipts which the invader gives for the goods he takes, and the contribution he levies are, if he is victorious, frequently redeemed by the Government of the state which is composed of the very persons whose

property has been commandeered; they are thus in effect paying themselves. The French Government had to repay the whole of the contributions raised by Germany, amounting to 39,000,000 francs, as well as the value of the Requisition receipts given by German officers. The capture of private property at sea, like the taking of requisitions and contributions and the destruction of houses for military requirements tends to spread the burden of war over the nation, and brings home the evils of war to the whole community, especially if a national guarantee against losses to shipowners is provided by the state. The knowledge that every private citizen will have to bear his share in the suffering which war produces is surely an incentive to the maintenance of peace, just as conscription or national service should tend to have a steadying influence on public opinion in democratic states in times when international relations are strained. Every family in the great military states of Europe knows that in case of war some of its members are liable to be summoned to their regiments, and that they may never return. War in this way becomes increasingly a national undertaking, and the cause must be indeed a grave and serious one which calls forth such a supreme act of sacrifice as it entails. Every state draws its wealth from the prosperity of its people. For victory, more is re-

quired than the overthrow of the armed forces of the adversary, "the destruction of the enemy's armed forces alone will not bring a war to a conclusion," says Admiral Mahan; "that is only the first phase, after that comes invasion and other pressure on the population to produce stagnation of the national life."[1] France was not vanquished when Sedan and Metz had capitulated; Paris had to be starved into surrender, and the whole nation had to be reduced, paralysed into submission. The prosperity of a nation depends on its capacity to maintain its commercial intercourse with other nations, and the property of individuals is in a sense more than merely private property. The prevention of its continuance of commerce both by land and sea, the blockade of ports, the capture of goods in transit—these are the tapping of the arteries of the national life. The maintenance of the rule of capture of enemy merchant ships and enemy cargoes thereon I consider to be both the most economical and effective means of producing the paralysis and stagnation of national life to which Admiral Mahan refers. "Command of the sea," writes Mr. Julian Corbett, the distinguished English naval historian, "means nothing more or

[1] "The Hague Conferences; the Question of Immunity for Belligerent Merchant Shipping" in *Some Neglected Aspects of War*, Chap. vi.

less than control of communications. It occupies exactly the same place and discharges the same function in maritime warfare that conquest and occupation of territory does in land warfare." [1] It is one of the means of cutting off the enemy from his supplies and preventing him from engaging in commerce. "There is only one security for a great naval power," said the late Sir William Harcourt, whose reputation as a statesman ought not to allow us to forget the fact that he was also the writer of the Letters of "Historicus" and the first Whewell Professor of International Law in the University of Cambridge, "as far as you can and as soon as you can to sweep the enemy from the seas. Not only must we preserve our right to fight against the navy of our enemy, but to capture all the ships it possesses, and all the means it possesses by which we may be attacked. It is the legitimate arm of this great Empire. The arm by which we defend our extended Empire."

I have stated my own view in regard to one line of argument which is often taken on this question of immunity from capture of private property at sea. I need hardly say that there are many other points from which the subject may be envis-

[1] See "Capture of Private Property at Sea," reprinted from the *Nineteenth Century* for June 1907, in Mahan's *Some Neglected Aspects of War*, p. 131.

aged. It is essentially a question which affects every merchant, nay, every citizen of our empire. It is one which cannot be settled off-hand, but calls for the fullest and minutest examination. It is a problem of extreme complexity and of grave import, but I fear also it is one on which the majority of Englishmen are ignorant, and in which they take but little interest. It was discussed at the Hague Conference in 1907 and by the Interparliamentary congress at Brussels, in 1910, and I anticipate that in the near future it will come into greater prominence. When it does, I sincerely trust that the nation will take no narrow and incomplete view of a highly complicated matter, and that we shall be saved from many of the rash assertions and deceptive half-truths which have characterized some of the recent discussions of questions of International Law.

II

HOSPITAL SHIPS AND THE CARRIAGE OF PASSENGERS AND CREWS OF DESTROYED PRIZES

HOSPITAL SHIPS AND THE CARRIAGE OF PASSENGERS AND CREWS OF DESTROYED PRIZES

EVERY war raises fresh problems. Sometimes the difficulties involved occasion acrid controversy between belligerents and neutrals leading almost to the verge of another war; sometimes the questions raised are passed by almost unnoticed, save by the international lawyer whose duty it is to note new situations as they arise and to endeavour to formulate principles for their solution.

A case which occurred during the Russo-Japanese war involves a point which is likely to become one of practical importance on some future occasion in regard to the question then at issue; and furthermore, it raises a problem of far-reaching importance, should the changes in law made by the Hague Conference of 1907 and the Declaration of London of 1909 be generally accepted, namely, what provisions belligerents will make for ensuring the safety of persons taken from prizes which they destroy.

The *Aryol* or *Orel* was a hospital ship of the Russian Red Cross Society. She was fitted out and employed in accordance with the provisions of the Hague Convention of 1899 for the adaptation to maritime warfare of the principles of the Geneva Convention of 1864. She was attached to the Second Pacific Russian Squadron and joined it at Tangier. She was captured by the Japanese man-of-war *Sadu Maru* during the naval engagement near Okino Shima and taken into Miura Bay for condemnation. The case came before the Prize Court of Sasebo and the result is reported in the *Japanese Official Gazette* of August 1, 1905. The *Aryol* was condemned as good prize on the following grounds: (1) She had communicated the orders of the Commander-in-Chief of the Russian Pacific Second Squadron to other vessels during her eastward voyage with this squadron; (2) She was carrying, by order of the Commander-in-Chief of the squadron, the master and three members of the crew of the British Steamship *Oldhamia* which had been captured by the *Oleg*, a warship of that squadron, with a view of taking them to Vladivostock, although they were in good health. (It may be noted in passing that the *Oldhamia* was seized near Formosa but stranded on the east coast of Urup, one of the Kurile Islands, where she was burned.) (3) She had been in-

structed to purchase in Cape Town or its neighbourhood 11,000 feet of conducting wire of good insulation; (4) When the Russian squadron was proceeding towards Tsushima Channel, she and another hospital ship, the *Kostroma*, navigated at the head of the squadron in the position usually occupied by reconnoitring ships.

These facts having been proved, the judgment of the Court proceeds as follows: "It is quite reasonable to assume that this hospital ship has been constantly employed for military purposes on behalf of the enemy's squadron. Therefore, this hospital ship is not entitled to the privilege stipulated for in the Hague Convention for the adaptation to maritime warfare of the principles of the Geneva Convention, and she may lawfully be confiscated according to international law." [1]

The condemnation of this ship appears, on the facts stated, to be fully justified. The *Aryol* had evidently been used for military operations and had forfeited the right to inviolability conferred on hospital ships by the Convention of 1899. But,

[1] The foregoing facts and judgment are taken from Professor S. Takahashi's *International Law as Applied to the Russo-Japanese War*, pp. 620–22. The case of the *Orel* is discussed by T. J. Lawrence, *International Law*, (4th edition), p. 411, who agrees with the decision of the Japanese Prize Courts.

would the *Aryol* have been liable to be condemned had none of the acts alleged against her been proved except the carriage of the master and three members of the crew of a destroyed merchant-ship, and, generally, does a hospital ship lose her immunities if she is used for the carriage of crews and passengers, in good health, taken from enemy or neutral merchant ships destroyed by a belligerent ?

Before dealing with these questions, and the wider one of the method of disposal of crews and passengers taken from a destroyed merchant-ship, it will be well to consider shortly how the law stands as regards the destruction of merchant-ships, neutral and enemy, by a belligerent, and to note the changes made in the status of the crews of captured enemy merchant-ships by the Hague Conference of 1907.

The right of belligerents to destroy *neutral* merchant-ships occupied the Hague Conference of 1907 for a considerable time, but no agreement was reached on the subject.[1] The Naval Conference of London, however, formulated certain rules on this subject which form Chapter IV (Articles

[1] See *La Deuxième Conférence internationale de la Paix*, vol. iii., pp. 898–905, 989–98, 1048–52, 1070–75, 1096–99, J. B. Scott, *The Hague Peace Conferences*, vol. i., pp. 725–30, also the writer's *Hague Peace Conferences*, p. 89.

48–54) of the Declaration of London, 1909, which however is still unratified. After laying down the general rule that neutral merchant-ships may not be destroyed, it is provided by way of exception, that neutral vessels which have been captured by a belligerent warship, and which would be liable to condemnation, may be destroyed, if the non-destruction, and taking of her into a port for adjudication by a Prize Court, "*peut compromettre la sécurité*" of the warship or the success of the operations in which she is engaged at the time (Art 49). However, before the vessel is destroyed, all persons on board must be placed in safety (*devront être mises en sûreté*), and all the ship's papers and other documents which the parties interested consider relevant for the purpose of deciding on the validity of the capture must be taken on board the capturing warship (Art. 50). The terms of Article 49 are extremely wide, but Article 51, with a view of providing a guarantee against the arbitrary destruction of prizes, provides that "a captor who has destroyed a neutral vessel must, prior to any decision respecting the validity of the prize, establish that he only acted in the face of an exceptional necessity of the kind contemplated in Article 49. This is explained as meaning "the captor must prove that the situation he was in was really one which fell under the head of the

exceptional cases contemplated. This must be proved in proceedings to which the neutral is a party, and if the latter is not satisfied with the decision of the National Prize Court, he may take his case to the International Court." [1]

The destruction of *enemy* merchant-ships has long been recognized as permissible under certain circumstances. These were formulated by the Institute of International Law at Turin in 1882 as follows: (1) If the captured ship is unseaworthy; (2) if she is unable to accompany the fleet; (3) if there is danger of recapture on the approach of a superior force of the enemy; (4) if the captor cannot without danger to himself spare a prize crew; (5) if the port of the captor is too remote for the vessel to be taken in. These regulations are, in the main, similar to those adopted by Great Britain, the United States, Russia and Japan.

In all cases where enemy ships are destroyed all persons on board and all documents "essential in elucidating the matter in the prize court" are previously to be taken from the ship (Russian Regulations, 1901, Art. 40. Japanese Regulations, 1894, Art. 22, and 1904, Art. 91). In the *Manual of Naval Prize Law* edited by Professor

[1] *Report* on the Declaration of London on Article 51.

Holland, the commander, when an enemy's ship is destroyed, is directed to remove the crew and papers and forward them to a proper port of adjudication in charge of a prize officer (Art. 304).

The legality of the destruction of enemy ships has further been recognized by Convention No. 6 of the Hague Conference of 1907, as Article 3 lays down that enemy merchant-ships which left their last port of departure before the commencement of the war, and which are met at sea while ignorant of the existence of hostilities, may be destroyed with indemnity, and on condition that the safety of persons as well as papers on board is provided for (*sous l'obligation de pourvoir à la sécurité des personnes*).

One more international agreement bearing on the subject must be referred to, namely, Convention 11 of the Hague Conference of 1907, which makes an important change in a rule which had long been established by providing that the crews of enemy merchant-ships, whether subjects of a neutral state or of the enemy state, are no longer to be prisoners of war, but on compliance with certain formalities involving a promise not to serve on an enemy's ship (in the case of neutral seamen), and not to engage in any service connected with the operations of war (in the case of enemy seamen), they are to be liberated (*see*

Articles 5–7). Ships taking part in hostilities are not included under these provisions (Art. 8).

The Convention of 1899 adapting to naval warfare the principles of the Geneva Convention, was amended by the Second Hague Conference in 1907, but the Articles which have any bearing on the subject under consideration were re-enacted without material change. There are, under these Conventions, three classes of hospital ships :—(*a*) Military hospital ships, that is to say, ships constructed or adapted by states specially and solely with the view of aiding the wounded, sick and shipwrecked ; (*b*) hospital ships, equipped wholly or in part at the expense of private individuals or officially recognized relief societies of belligerent states ; (*c*) hospital ships equipped wholly or in part at the expense of private individuals or officially recognized societies of neutral states. In the case of all three kinds of ships it is stated that they "*sont respectés et ne peuvent pas être capturés pendant la durée des hostilités*," providing that their names are officially notified to the hostile power at the commencement of or during hostilities, and, in any case, before they are employed. The duties of these ships are to afford relief and assistance to the *wounded*, *sick* and *shipwrecked* (*naufragés*) of the belligerents without distinction of nationality (Art. 4). The words

employed throughout these Conventions—*blessés, malades et naufragés*—were selected by the Committee in 1899 in preference to *les victimes de la guerre maritime*, which had been proposed, as it was felt that although the latter form of words would be true in the majority of cases, it would not be so always, and, therefore, as it was not universally applicable, it was rejected. The words adopted are intended to include wounded or sick soldiers who are being transported from the scene of military operations on land.[1] The Conventions of 1899 and 1907 deal throughout with sick, wounded and shipwrecked combatants, and they provide that the sick, etc., of one of the belligerents who fall into the power of the other belligerent, are prisoners of war. Passengers and crews taken from destroyed merchant-ships, except where the officers and crew refuse to give their parole, will never come under such designation.

By Article 4 of the Conventions under consideration the Governments of the contracting powers undertake not to use the hospital ships for any military purpose. This is explained in the Report of the Committee in 1899 as meaning that under no pretext are such ships to be directly or indirectly used for military operations, collecting

[1] Parliamentary Papers, *Miscellaneous*, No. 1 (1898), p. 74.

information, transmitting despatches, carrying combatants, arms or ammunition. The examples given are clearly not meant to be exhaustive; the *Aryol* was, however, guilty of committing two out of the three acts named.

The changed conditions of modern warfare are gradually being recognized by alterations in the conventional law of nations, but these changes by no means always tend to a mitigation of the severities of war. The organization of the fighting ships of to-day is totally different from that of the ships in the days when Stowell, Marshall and Story were administering the law. It is rare for a modern warship to carry a spare man. The whole complement has its allotted duties. The work of commerce destroyers in modern warfare will often be undertaken by small vessels of war of great speed but with slight means of defence, though armed with powerful offensive weapons.[1]

The difficulty of providing men to form prize crews for captured ships is one which will often be insurmountable, and in the early stages, at any rate, of a naval war it is not improbable that belligerents will exercise to the full their right of sinking captured enemy merchant-ships. In such cases International Law, both customary and conven-

[1] See Memorandum by Rear-Admiral Slade, Parliamentary Papers, *Miscellaneous*, No. 5 (1909), p. 274.

tional, requires the commander of the capturing vessel to provide for the safety of the passengers and crew before destroying the ship; but this requirement does not appear to mean more than that he must see that such persons are not imperilled by the destruction of their ship. It must often happen that when a ship has been sunk there is no merchant-ship at hand to take on board passengers and crew, and in such cases they must of necessity be transferred to the ship of war, which even if it be one of the largest battle-ships will be ill-equipped for their reception. They will be for the time being exposed to inconvenience and the possibilities of a naval engagement.[1]

When the subject of the destruction of neutral prizes was under discussion at the Hague and at London, it was contended that in recent wars the question of the fate of the crew and passengers had not raised any difficulties, and further that any dangers which they might incur by transference to a ship of war are not the fault of the captor,

[1] This view is also expressed in the *International Law Topics and Discussions* of the United States Naval War College for 1905 (p. 74). On the other hand, Mr. F. E. Bray considers that the mere transfer to the belligerent cruiser will not satisfy the conditions of the Declaration of London. (*British Rights at Sea under the Declaration of London*, p. 60).

who is exercising his legitimate right, but are due to the default of the owner or master of the merchant-ship for violation of rules of law relating to blockade, contraband or unneutral service.[1] In the case of passengers embarking on an enemy merchant-ship, it was urged, they must be taken to know of the dangers to which they are exposed. The latter point may be true generally, but Article 3 of Convention No. 6 of the Hague Conference of 1907 permits destruction even in cases where the passengers embarking could not possibly have known of the danger, namely, where the ship sails before the outbreak of war.

Neutrals will be found to have made a great concession to the demands of "military necessities" by the adoption of Chapter IV of the Declaration of London, should this Declaration become generally accepted. It will remain for the International Prize Court in the last resort (if the International Prize Court Convention of 1907 is ratified) to decide whether the circumstances were such as to justify the destruction of a neutral ship. In the case of enemy ships, the destruction will generally, and apart from questions relating to neutral cargoes, still remain solely under the jurisdiction of the prize courts of the belligerents.

[1] *La deux. Confér.*, vol. iii., p. 900, Parliamentary Papers, *Miscellaneous*, No. 5 (1909), p. 369.

Meantime the practical details of the disposal of crew and passengers are left to the solution of the naval officer on the spot.

Notwithstanding the advance of humanitarian views in the region of the actual conduct of hostilities—an advance due as much (if not more) to the belligerent officers themselves, as to humanitarian advocacy—war remains war, with all its immense possibilities for the infliction of suffering, not only to the combatants themselves, but to non-combatants also. Facts contradict the theory of war being a relation of state to state only. So long as the destruction of prizes is permitted by the customary or conventional law of nations, the hardships and dangers to passengers on board will remain, and continue to furnish one of the means of destroying the carrying trade of the enemy. The extent to which destruction will be resorted to will entirely depend on the conditions under which the combatants are fighting.[1]

If the passengers and crew of a destroyed ship are transferred to a warship, the commander will

[1] According to the Tables provided by Professor Takahashi, Russia captured 24 Japanese ships, 21 of which were destroyed, while of 9 neutral ships captured 6 were destroyed. (*Op. cit.*, p. 276.) For the sinking of neutral ships by Russia see also A. S. Hershey, *International Law and Diplomacy of the Russo-Japanese War*, pp. 143–59.

do his best to get rid of them at the earliest opportunity, either by landing them at a port of his own or of a neutral state, or by transferring them to a merchant-ship of his own or of a neutral flag. These were the methods pursued by the Russians except in the case of the four members of the crew of the *Oldhamia* who were placed on the *Aryol*. Apart from the dictates of humanity, the naval commander will naturally seize the first opportunity of placing out of harm's way the men, women and children who are consuming his provisions and hampering the working of his vessel. If he meets a hospital ship on which there is sufficient accommodation, he may be tempted, either on this account or for humanitarian reasons in order to avoid the risk of imperilling non-combatants, to transfer them to the ship flying the Red Cross flag. But the duty of a hospital ship is to take on board wounded, sick and shipwrecked combatants, and it does not come within her duties to provide accommodation for uninjured passengers and crews taken from destroyed merchant-ships, thereby rendering valuable assistance to the war-ship from which they are received. Should she be visited by an enemy cruiser while carrying such persons she would be *prima facie* liable to capture. It is possible that a Prize Court might order her release where the "military necessity" which

caused the transference of such persons to the hospital ship was proved to be identical with the highest requirements of humanity, but it is not probable that anything short of the fact that a naval engagement was imminent would be held to afford a naval officer any justification for the transference from a warship to a hospital ship of the passengers and crews of sunken vessels. An officer who resorts to the extreme step of sinking a prize without waiting for the decision of a court of law must make his own arrangements for the reception of the persons on board; he must be prepared to bear the odium which will attach to him if his action imperils their lives. The Hague Conventions of 1899 and 1907 were not entered into with a view of rendering inviolable ships which are used for the carriage of the *victimes de la guerre maritime* in all cases, but only those carrying *blessés, malades et naufragés.*

III

NEWSPAPER CORRESPONDENTS IN NAVAL WARFARE

NEWSPAPER CORRESPONDENTS IN NAVAL WARFARE

QUESTIONS of great importance were raised by the intrepid action of the Correspondent of *The Times* during the Russo-Japanese War in fitting out the *Haimun* for use as a press-boat, and for the first time utilizing for the transmission of intelligence from the theatre of maritime hostilities the most recent resources of science in the form of wireless telegraphy, with which his ship was specially equipped.

The legal status of war-correspondents in naval warfare under the wholly changed conditions brought about by wireless telegraphy does not yet appear to have received any general attention even by publicists. The position of *The Times* correspondent is discussed in works on the Russo-Japanese War such as those of Dr. Lawrence, Professor Hershey and Messrs. Smith and Sibley. There is astonishingly little to be found on the subject of newspaper correspondents in general works on International Law. The *International*

Law Situations of the United States Naval War College for 1904 contains, as far as the writer is aware, by far the fullest discussion of their treatment, and the account there given is reproduced verbatim by Professor Takahashi in the Chapter on "War Correspondents of Foreign Newspapers and Correspondents' Ships" in his volume on *International Law applied to the Russo-Japanese War.*[1]

The incident to which reference has been made may be shortly recalled. During the Russo-Japanese War, a British war-correspondent having installed De Forest wireless telegraphic apparatus on the *Haimun* cruised about the Gulf of Pe-chi-li and adjacent waters as near Port Arthur as was practicable. The *Haimun* flew the British flag. Despatches were sent by wireless telegraphy to a

[1] T. J. Lawrence, *War and Neutrality in the Far East*, Chap. v.; F. Despagnet, *Droit International Public*, § 537; A. S. Hershey, *International Law and Diplomacy of the Russo-Japanese War*, Chap. iv.; L. Rolland, *La télégraphie sans fil*, p. 27; M. Kebedgy, *La télégraphie sans fil et la guerre*; *Revue de Droit international public* (2 Série), vol. vi., p. 445; S. Takahashi, *International Law as applied during the Russo-Japanese War*, Chap. v.; H. D. Hazeltine, *The Law of the Air*, pp. 103–5; Bonfils-Fauchille, *Droit International*, § 1,100; A. C. Dewar, *The Necessity of Press Censorship in War*, *United Service Magazine*, April, 1910, p. 29; S. L. Murray, *The Reality of War*, p. 87; United States Naval War College, *International Law Situations*, 1907, pp. 156–64.

receiving station at the neutral port of Wei-hai-wei, whence they were transmitted by cable to London and New York, as the correspondent in question was acting both for the London *Times* and the New York *Times*. The correspondent stated that his message being in cipher could not be received by either Russian or Japanese instruments, that they were all sent to a neutral cable office, and that they were all sent off either in neutral waters or on the high seas. The *Haimun* was visited several times by Japanese cruisers and once by the Russian cruiser *Bayan*. As a neutral merchant vessel the *Haimun* was of course liable to visit and search by belligerent warships, and there was no attempt made by the Correspondent to conceal his mission. The Russian Government, however, on April 15, 1904, informed both the United States and the British Governments that Admiral Alexieff had issued the following declaration: "In case neutral vessels, having on board correspondents who may communicate war news to the enemy by means of improved apparatus not yet provided for by existing conventions, should be arrested off Kwangtung or within the zone of operation of the Russian fleet, such correspondents shall be regarded as spies, and the vessels provided with such apparatus shall be seized as lawful prize." This version is that of the French text and accords

with the language used by the Under-Secretary of State in the House of Commons on April 20, 1904. Another version reads "correspondents who are communicating." There was certainly no evidence that *The Times* Correspondent was communicating news to the Japanese, and the opinion of Lord Lansdowne that the attitude of Russia was "unjustifiable and altogether absurd" seems a thoroughly sound one. The Correspondent was no spy. It is not suggested that a person in such a position as that of a newspaper correspondent may never be guilty of espionage, circumstances may well be imagined in which a professed war-correspondent by acting clandestinely and under false pretences might obtain information and communicate it to one of the belligerents; in such a case, the other belligerent would be justified in exercising the full rigour of his war rights.[2] The mere fact of the possession by a vessel of wireless apparatus is not sufficient to prove espionage on the part of the persons on board, and the communication by a neutral of information to one of the belligerents, when he is not acting clandestinely or on false

[1] See Despagnet, *Droit International*, § 537; Bonfils-Fauchille, § 1,100, United States Naval War College, *International Law Situations* for 1907, pp. 162, 163.

[2] A case approximating to this is dealt with subsequently. See post, p. 96.

pretences, and in this way seeking to obtain information in the zone of operations of one belligerent with a view of communicating it to the other, will only render him guilty of an act of unneutral service. The subject of unneutral service, owing to the changed conditions of modern naval warfare, was in an unsettled condition in 1904 and in great need of consideration and revision. This work was successfully undertaken by the Naval Conference of London, and Articles 45 to 47 deal with Hostile Assistance or Unneutral Service rendered by a neutral to one of the belligerents, and the rules there laid down are logical deductions from admitted principles, and will, it is submitted, obtain in practice even if the Declaration should not be ratified. To summarize shortly those cases which are appropriate to the question under discussion, the Declaration of London provides that a neutral ship will be condemned and receive the same treatment as if she were carrying contraband if she is on a voyage specially undertaken with a view to the transmission of intelligence in the interest of the enemy, or if to the knowledge of either the owner, charterer or master she is transporting one or more persons, who, in the course of the voyage, directly assist the operations of the enemy. A neutral ship will also be condemned as an enemy merchant vessel if she takes a

direct part in hostilities or is at the time exclusively devoted to the transmission of intelligence in the interest of the enemy. Without pausing to inquire into the various ways in which neutral vessels may perform any of these services, it is sufficient to note that the Articles (should the Declaration be generally accepted) now provide the belligerents with clear rules for the treatment of neutral vessels engaged in assisting one belligerent by transmitting information or doing other acts on behalf of his adversary. One example from the Russo-Japanese War is instructive. The *Industrie*, a German steamship, was captured by the Japanese and condemned. She had been chartered by an American at Shanghai for the use of a German war correspondent of the Chefoo *Daily News*. On behalf of the owner of the ship it was contended that the *Daily News* was not published (as alleged) under Russian protection. That the reporter was an ordinary newspaper reporter observing impartially the movements of both belligerents. That newspaper-reporting was a work of public interest and not an unneutral act. The Court rejected these pleas and condemned the vessel on the ground that the *Daily News* was a small paper that first appeared at the commencement of the war and the proprietor had no means of being able to charter a vessel for the purpose of

reporting; that the ship was in fact chartered by the Russian Government, and sent under the pretence of making war reports to watch the Japanese fleet and to report military secrets, and that the owner knew of the scheme. The Correspondent in this case was fortunate not to have been accused of espionage, for he admitted on examination that he thought all his reports would be transmitted to the Russian Consul at Chefoo or Shanghai and thence to the Russian Government.[1]

The general position of bona-fide war-correspondents who do not fall under any of the cases mentioned in Articles 45 or 46 of the Declaration of London remains to be considered. The situation is novel, especially since the introduction of wireless telegraphy and the establishment of a vast network of submarine cables and land telegraphs by means of which, from hundreds of wireless stations, messages may be transmitted all over the world in an infinitesimally small space of time. Further, there is now the Wireless Telegraph Convention of 1906, by which all the signatory Powers accept the principle of the *obligatory* re-

[1] This case affords one of many examples of the admirable way in which the Japanese were served by their Intelligence Department. For full report of the case see S. Takahashi, *Op. cit.*, pp. 397, 732. See also the case of the *Samson* (another Press boat), p. 402.

ception of wireless messages by coast stations from ships at sea regardless of the kind of apparatus in use; and a small number of Powers (not including Great Britain, Japan and Mexico) accept the principle of the obligatory reception of wireless messages between ships at sea.[1] The scope of war-correspondents at sea may thus be largely increased.

In land warfare it is generally recognized that a military commander has the right to remove from the theatre of war all persons whose presence may be likely to militate against the success of his operations. Newspaper correspondents and others who follow an army without directly being attached to it are expressly mentioned in the Hague Regulations on land warfare as persons who, if they fall into the enemy's hands, may, if the latter think fit, be detained by him and be treated as prisoners of war if they can produce a certificate from the military authorities of the army they are accompanying (Art. 13). It is therefore customary for newspaper correspondents to report themselves to headquarters to receive the necessary permit to accompany the army; the receipt of the permit obliges them to conform to all the regulations the commanding officers may make in regard to their

[1] See H. D. Hazeltine, *Op. cit.*, p. 99; L. Oppenheim, *International Law*, vol. i. (2nd ed.), p. 355.

despatches. These latter may generally only be sent off after they have passed the press censor. All communication in cipher is generally forbidden over all the telegraphs over which a belligerent has control. The complaints of some continental states with respect to cipher telegrams during the Boer War sent via systems under British control will be remembered. Infringement of the regulations issued by a commanding officer to reporters involves the withdrawal of the permission given to them, and, if necessary, their forcible detention or removal.[1]

Both Japan and Russia issued special regulations for war correspondents on land, the former being particularly definite and concluding with an Article providing that correspondents guilty of violation of the civil law, military criminal law and law for the preservation of military secrets might be adjudged and punished by courts martial according to the military penal code.[2]

There are no international conventions dealing in any way with the position of war correspondents in naval warfare, and the whole situation is

[1] For the treatment of war correspondents during the Spanish-American War, see E. J. Benton, *International Law and Diplomacy of the Spanish-American War*, pp. 153–155.

[2] Cited in United States Naval War College, *International Law Situations* (1904), p. 113.

very different from land warfare. The sea, except within the limits of the territorial waters of the belligerents and within the area of operations of a blockading fleet, is open to the navigation of the whole world. There has been a constant struggle between neutrals and belligerents in regard to interference of the latter with the complete freedom of communication of the former with a belligerent state. Neutrals have had to submit to restrictions. Neutral ships everywhere are liable to be visited and searched, though it was contended by Germany both during the Russo-Turkish and Boer Wars that search may not be carried out in seas far distant from the theatre of war ; they are liable to capture for breach of blockade, carriage of contraband, acts of unneutral service. They run the risks of being damaged or sunk if they are within the area of a naval engagement, and as the Mines Convention of the Hague Conference of 1907 failed to settle the question of the limits within which these deadly instruments of destruction may be laid, there will also be the danger to innocent navigation from them.

Japan issued special regulations for naval war-correspondents accompanying the navy, based on the same principles as those for the army, including an order that no communications concerning war should be sent until after they had been examined

by officers nominated for the purpose by the commanding officer of the fleet which he accompanied.[1] But they leave untouched the question of Press boats and of individuals who on neutral vessels, unattached to either belligerent fleet, scour the seas in search of the latest intelligence concerning the operations of war for transmission to the newspapers by wireless telegraphy or other means. The Japanese military authorities after a time requested *The Times* correspondent on the *Haimun* not to proceed north of the Chefoo-Chemulpo line until further notice. He was thus, as he stated in a communication to *The Times* of May 16, 1904, threatened with capital punishment by one belligerent, and warned off a portion of the high seas and neutral waters by the other. He submitted to the Japanese restrictions, but shortly afterwards he discontinued his adventurous undertaking.

What justification had Japan for forbidding the *Haimun* to pass beyond certain limits? *The Times* correspondent does not appear to have complied with the Japanese regulations for naval war correspondents, he was a neutral subject, sailing the open sea in a neutral ship; none of his messages were sent off through other than neutral

[1] Cited in United States Naval War College, *International Law Situations* (1904), p. 114.

channels. His doings were open to the inspection of any officer of either a Russian or Japanese cruiser who chose to visit him. Was the Japanese order then an unjustifiable interference with a neutral ship? I think not. "Every Admiral who has been in command in time of war knows how troublesome, and even dangerous, it would be for a fleet to be followed by a cloud of private ships, ever hovering round it to see what it was doing, and able to waft whatever they saw or imagined they saw all over the world with little or no supervision." [1] Neutral ships with correspondents on board will, in the future, probably have to submit to limitations of their freedom of movement in certain areas at least. It is increasingly recognized that secrecy is the soul of success in naval operations. The civilian has as yet not fully realized this important fact. He is not satisfied unless his morning paper has the fullest details from the seat of war. Speaking in the House of Lords in 1904, Lord Selborne in reply to a question by Lord Ellenborough said, in relation to the Press and information of importance in war: "It is a matter in which Parliament must invoke the patriotic co-operation and collaboration of the Press.

[1] T. J. Lawrence, *War and Neutrality in the Far East* (2nd ed.), p. 92.

I do not exaggerate when I say that the most patriotic journalist might in the day or two preceding war publish news which might mar the whole issue of the naval campaign of this country." He might also unwittingly do the same thing during the course of the war. Stringent regulations may be expected to be enforced in the future against all correspondents, both on land and sea, for no belligerent will run the risk of having his operations of war frustrated, or their cost immensely increased by the transmission of news to satisfy the craving of the public for details of what is happening to the armies or navies of the combatants. "It is on its face far more necessary for a state that its commanders should be unhampered in the prosecution of their military operations in order that they may bring them to a successful issue than that the people of a state should know from hour to hour exactly what the military force is doing. That is what the enemy desires particularly to know. War is not ordinarily undertaken to give an opportunity for the display of journalistic enterprise, and no commander would be justified in unnecessarily sacrificing resources or men to such an enterprise."[1]

[1] United States Naval War College, *International Law Situations* (1904), p. 111.

In itself the report of a war-correspondent may be quite harmless, but coupled with the information which the belligerent has himelf obtained it may supply just the link that was missing in his chain of inquiry. A neutral war-correspondent on a ship fitted with wireless telegraphy might be able to intercept the messages of both belligerents, and though by reason of their being in cipher he could not interpret them, yet a clever operator could draw inferences as to the positions, actions and nationality of the belligerent vessels.[1] If he transmits these views to his journal, a strategical movement of one of the belligerents which might have ended the war may possibly in this manner be disclosed and irreparable injury done to him. Self-preservation is the first law of states as of individuals. The laws of war allow a belli-

[1] H. D. Hazeltine, *The Law of the Air*, p. 104. See the account of his career given by *The Times* War-Correspondent in *The Times* of August 27, 1904: "We were now able to receive both Russian and Japanese messages. These messages of course came in cipher, and, as we possessed no key, it was impossible to make any improper use of messages thus received but . . . we were able, approximately, to tell the distance we were from the various ships. Moreover, our operator, who was extremely expert, began to recognize the notes of the various ships; that is to say, he could tell if a Russian ship was at sea by listening for the answering communication from the shore. . . . We listened, and came to conclusions which invariably correctly guided us in our movements."

gerent, as in the case of the Right of Angary, not only to destroy or appropriate enemy property, but under special circumstances give him a right to do the same to neutral property. The laws of war again allow of blockade by which neutral merchantmen are in effect excluded from large portions of the high seas which were open to all in time of peace.

What methods are belligerent commanders likely to take to enforce the secrecy of their operations against the over-inquisitiveness of the war-correspondent? When the subject of wireless telegraphy was under discussion at the Institute of International Law at Ghent in 1906 that body of international lawyers in formulating rules for the transmission of Herzian waves during war time agreed in Article 6 that "on the high seas, in the zone covered by the sphere of action of their military operations, belligerents may prevent the despatch of Herzian waves by a neutral state." If by a neutral state, surely also by a neutral individual. M. Rolland also suggests that each belligerent should be allowed to prohibit the emission of Herzian waves by a neutral on the high seas in a zone corresponding to the sphere of action of its military operations "under penalty of confiscation of the apparatus where the message sent was harmless, and if of an unneutral character, the ship

and apparatus to be condemned." Dr. Lawrence in discussing this subject while the Russo-Japanese War was in progress wrote: "Power should be given by international convention to exclude the vessels of correspondents for a time from any zone of sea in which important warlike operations were in process of development. Each belligerent should have a right to place an officer on board a newspaper steamer to act as censor of its messages; and the penalty for persistent obstruction and refusal to obey signals should be capture and confiscation." [1]

It would certainly be well that the Powers should enter into an international convention on the subject. When the next Hague Conference in pursuance of the *Vœu* uttered in 1907 undertakes the preparation of regulations relative to the laws and customs of naval war it is hoped that some agreement may be reached recognizing the power of exclusion of war-correspondents from certain areas of their naval operations to belong to belligerents (it may be that it will also have to be recognized in regard to neutral shipping generally). Meantime, should war unfortunately break out between naval Powers before the next Conference, the belligerents will in all probability

[1] *Op. cit.*, p. 92.

act on some such plan in regard to exclusion, and further they will probably issue and enforce regulations either limiting, or even wholly prohibiting, the use of wireless telegraphy within certain areas of the operations of their fleets in accordance with the principles laid down by the Institute of International Law. Under the Declaration of London, as has been already seen, any unneutral use of wireless telegraphy on a neutral vessel renders her liable to capture and condemnation.

But the plan suggested by Dr. Lawrence (if I rightly understand it) of each belligerent placing a press-censor on board a neutral Press boat, is, I venture to think, impracticable. I do not think the plan would work with satisfaction either to the belligerents, the correspondent, or the proprietors of the newspaper he represented.[1]

The principles of the rules of war on land should be applied with the necessary modifications as has been done in the case of neutral Red Cross assistance. Both on land and sea it has been

[1] Dr. Lawrence informs me that further consideration has led him to the conclusion that the plan he suggested in 1904 would be undesirable, and that the solution of the problem that I suggest below, and which he himself held at first, namely, exclusion of newspaper steamers from a given zone of sea or their admission under strict belligerent censorship is to be preferred.

recognized that the indiscriminate assistance of neutral Red Cross detachments is impossible, they must in each case be under the complete control of one side or the other. The Committee of the Hague Conference of 1907 considered that for reasons of military necessity it was inadvisable to allow neutral hospital ships to operate apart from the special authorization of one of the belligerents, the view that such ships might desire to aid both belligerents indiscriminately being unacceptable on the ground that to allow complete independence of action to such neutral ships would leave the way open to serious abuses.[1] With the necessary change of words this statement would apply with greater force to newspaper correspondents, and the principles of the Convention for the adaptation to maritime warfare of the principles of the Geneva Convention in regard to neutral hospital ships might be taken as a precedent for the treatment of Press boats.[2]

Newspaper correspondents would thus fall under two classes; (1) those actually on board one of the belligerents' ships of war, for whom regulations might be made on a plan similar to those issued by the Japanese Government in 1904, and

[1] See the writer's *Hague Peace Conferences*, p. 383.

[2] This is also the conclusion arrived at in the United States Naval War College, *International Law Situations* (1904).

(2) those on board ships specially chartered and attached to one of the belligerents' squadrons. The latter would receive a certificate similar to that issued to correspondents attached to land forces evidencing their profession ; the acceptance of this permission would involve an undertaking to comply with any regulations issued by the commanding officer of the fleet. A censor would be placed on board, without whose permission no despatches could be transmitted. Violation of any regulations would involve the withdrawal of the permission, and if necessary the removal of the offender from his ship, and the retention of it until the termination of war, or even its confiscation, according to circumstances. Press boats would, like hospital ships, undertake not to hamper in any way the movements of the combatants, and any orders issued by the commander of the fleet in regard to their movements should be entered on the ship's books. Regulations of such a character would have the effect of placing the transmission of news from the seat of war under the control of the belligerent commanders themselves. The legitimate desire of the world at large to know what was happening would be satisfied, only partially, it is true, but "military necessities," which play so large a part in all departments of the laws of war, may well justify a commander in assuming to judge

of how much information may safely be communicated to the general public. It might thus be necessary, under some circumstances, completely to exclude from certain areas newspaper correspondents altogether.[1]

Correspondents complying with regulations such as those suggested should if they fall into the power of the other belligerent be accorded the privileges of prisoners of war, and their vessel might be either detained till war was over, or even requisitioned on payment of compensation. "Private unresponsible persons or agencies would therefore be forbidden within the field of operations or the strategic area"[2]

In the absence of an international convention dealing with the subject, the attitude which neutral states are likely to assume in regard to the limitation imposed by belligerents on their freedom of navigation of neutral Press boats remains to be considered. It was pointed out during the course of the Russo-Japanese War that though neutral states protested against the action of the combatants on several occasions, there was a tendency to refrain from speaking distinctly, or, at any rate,

[1] See Professor Woolsey, *Wireless Telegraphy in War*, 14; *Yale Law Journal*, p. 254.

[2] United States Naval War College, *International Law Situations* (1904), p. 116.

in most cases very effectively, as to certain acts which, on the face of them, seemed to conflict with the plain rights and duties of neutrals; and a reluctance to do anything that might hinder governments in the event of war from doing all that expediency might under unforeseen circumstances dictate.[1] This same attitude manifested itself on numerous occasions at the Hague Conference in 1907, especially in the discussions on submarine mines.[2] States, especially the Great Powers, had constantly before them the possibility of the neutral of to-day becoming the belligerent of to-morrow, and they hesitated about laying down restrictions which as neutrals they would welcome, but as belligerents deplore. Much would depend on the circumstances of the war, and different neutral states would be actuated by different considerations, but, speaking broadly, my own opinion is that if the belligerent regulations outlined above were framed with care and administered with tact, every precaution being taken to interfere as little as possible with neutral commerce, a similar attitude to that which they assumed during the Russo-Japanese War would be found to exist. Belligerents will be able, if the Hague Convention

[1] Sir John Macdonell in *The Nineteenth Century*, July 1904, p. 148, deals with this point.

[2] See the writer's *Hague Peace Conferences*, pp. 320–45.

(No. 12) 1907 is ratified, in case neutral Press boats are seized and condemned by their Prize Courts for breach of their regulations, to refer neutral states to the final decision of the International Prize Court.

IV

THE CONVERSION OF MERCHANT SHIPS INTO WAR SHIPS

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I

THE preamble to Convention No. 7 of the Hague Conference of 1907 recites that "the Contracting Powers having been unable to come to an agreement on the question whether the conversion of a merchant ship into a war ship may take place upon the high seas, it is understood that the question of the place where such conversion is effected remains outside the scope of this agreement and is in no way affected by the following rules." The Report to the Drafting Committee presented to the Naval Conference of London which prepared the Declaration of London of 1909, after summarizing the discussions on this subject and recording again a failure to reach any agreement on the question of the legality of the conversion of a merchant vessel into a war ship on the high seas concludes with the following words:—"The question of conversion on the high seas and that of reconversion therefore re-

mains open." The questions involved in the discussion of the place of conversion of a merchant ship into a cruiser are part of a wider topic, namely the legitimate combatants in the prosecution of war at sea. On land, though the question cannot be said to be entirely answered, yet, general principles are laid down in the Regulations annexed to the Convention on the Laws and Customs of War on Land for the determination of the character of lawful belligerents.

The international agreements which primarily bear on the matter are two; (1) the Declaration of Paris, 1856, which by Article 1 provides that "Privateering is and remains abolished" and Convention No. 7 of the Hague Conference of 1907 relative to the conversion of merchant ships into war ships, a part of the preamble to which has just been cited. The first paragraph of the preamble of the latter is as follows: [The contracting parties] "Considering that in view of the incorporation in time of war of merchant ships in the fighting fleet it is desirable to define the conditions subject to which the operation may be effected, etc." The Convention consists of six articles of practical importance, the remaining six being common to nearly all the Hague Conventions allowing *inter alia* for denunciation after the lapse of a year from the date of notification. These six effective articles

defining the conditions under which merchant ships may be incorporated in the fighting fleet will be set forth at a later stage of our inquiry; their object was more effectively to ensure the abolition of privateering provided for by the Declaration of Paris, as the effectiveness of this Declaration was thought by many to be threatened by the growth of volunteer navies, and the arrangements which had been made by many states for the incorporation in their navies of fast merchant steamships on the outbreak of war.

Privateers, the employment of which the parties to the Declaration of Paris agreed to relinquish, were private ships, fitted out and armed by private persons, who received a commission from the State, called "letters of marque," authorizing them to act as legitimate combatants. They gave a bond for the security of their compliance with the laws of war, and their prizes were in practice adjudged to them. The object of the institution, apart from its damage to the enemy's commerce, was the desire of gain on the part of the persons to whom letters of marque were given. The advantages of the system of privateering were, says Woolsey, an American publicist of distinction, that seamen thrown out of work by war could thus obtain a livelihood and be of use to their country; that a nation with a small fighting fleet could thus raise a tem-

porary force in a short time and at a small cost. On the other hand the motive of the holders of letters of marque was plunder and self-enrichment, sailors were prevented from joining the regular ships of war, there was an absence of proper control over the crews, and most important of all, the exercise of belligerent rights against neutrals, such as visit and search, in which a high degree of character and forbearance in the commanding officer is of special importance, was frequently carried out in such a manner as to produce serious international complications between the belligerent and neutral states.

At the outbreak of the Crimean War Great Britain and France announced that they would not employ privateers during the war, and at its conclusion the Declaration of Paris was signed, and has since been adhered to by all the important states of the world except the United States of America, though this latter Power has in practice observed its rules.

The Declaration of Paris marks a great victory for neutral claims, though the abolition of privateering has been attributed by some continental writers to sinister aims on the part of Great Britain. Lord Clarendon was induced to accept the abolition of privateering in return for the safety of neutral goods under the flag of the

enemy, and the whole transaction was one in which Great Britain looked to the gain to neutral commerce: it was supported by both Lord Clarendon and Lord Palmerston on the ground of its advantage to Great Britain as a great mercantile Power.

Further consideration of the first Article of the Declaration has inclined many writers to the opinion that the act was a hasty one. Mr. Gibson Bowles has attacked it with vehemence and skill, and cites the statement of the late Lord Salisbury who in 1897 wrote of the Declaration of Paris that it "was a rash and unwise proceeding." In France the abolition of privateering has been bitterly attacked by Hauteville, Giraud, Caron and Bonfils. In Germany also there are writers who consider the abolition of privateering most dangerous for the empire. It is urged by the opponents of the Declaration of Paris that it was not the abolition but the proper regulation of privateering that was needed, and says M. Bonfils, "we are convinced that privateering will reappear in the future, for it is one of the conditions of the struggle for life between maritime nations of unequal power." [1]

A proposal made by Prussia in 1870 raised

[1] Bonfils-Fauchille, *Le Droit International*, § 1,395.

the question of an evasion of the Declaration of Paris. A Royal Prussian decree was issued on July 24, 1870, for the formation of a voluntary naval force. German shipowners and sailors were called upon to place themselves and their ships at the disposal of the State. Volunteer ships were to be placed under naval discipline and officers and crew were to wear the uniform of the navy. A premium was offered for such enemy ships as should be destroyed or captured by volunteer ships, varying from 50,000 thalers for an iron-plated frigate to 10,000 thalers for a screw steamship. The French Government at once brought the matter to the notice of Great Britain, as they considered the Prussian decree an attempt to re-introduce privateering and an indirect violation of the first Article of the Declaration of Paris.[1] Lord Granville replied to the French ambassador that he had taken the opinion of the Law Officers of the Crown, who advised that there were substantial distinctions between the proposed naval volunteer force sanctioned by the Prussian Government

[1] Professor Dupuis points out that at the moment when states were increasing their land forces, the Declaration of Paris sought to bring about a limitation in sea forces, and that the state which had been the first to bring the whole nation into the ranks of the army was the first to call on shipowners to bring their ships within the Federal Navy. (C. Dupuis, *Le Droit Maritime*, § 81).

and the system of privateering which, under the designation of "*la course*," the Declaration of Paris was intended to suppress. Lord Granville went on to say that Her Majesty's Government could not object to the Prussian decree as a violation of the Declaration of Paris, but that the Prussian Government's attention should be drawn to the Declaration in the hope and belief that Prussia would take care to prevent by stringent instructions any breach of that declaration. Hall makes the following commentary on Lord Granville's letter and the Prussian proposal in general:

"Nevertheless it hardly seems to be clear that the differences, even though substantial, between privateers and a volunteer navy organized in the above manner would necessarily be always of a kind to prevent the two from being identical in all important respects. In both, the armament is fitted out by persons whose motive is wish for gain, in both, the crews and officers are employed by them and work therefore primarily rather in their interests than in those of the nation. The difference that in the particular case of the Prussian volunteer navy attacks upon men of war were alone contemplated was accidental and would have been temporary. At the beginning of the war Prussia announced her intention not to capture private property at sea in the hope of forcing France to spare

the commerce which she was herself unable to protect. If the war had been continued for any length of time after January 1871, when this announcement was withdrawn, and if a volunteer navy had in fact been formed, it would of course have been authorized to capture private property; and there is no reason to suppose that any state acting upon the custom of seizing private property would make a distinction between public and private vessels in the powers given to its volunteer navy. The sole real difference between privateers and a volunteer navy is then that the latter is under naval discipline, and it is not evident why privateers should not also be subjected to it. It cannot be supposed that the Declaration of Paris was merely intended to put down the use of privateers governed by the precise regulations customary up to that time. Privateering was abandoned because it was thought that no armaments maintained at private cost, with the object of private gain, and often necessarily for a long time together beyond the reach of the regular naval forces of the state, could be kept under proper control. Whether this belief was well founded or not is another matter. If the organization intended to be given to the Prussian volunteer navy did not possess sufficient safeguards, some analogous organization no doubt can be procured which

would provide them. If so, there could be no objection on moral grounds to its use ; but unless a volunteer navy were brought into closer connexion with the state than seems to have been the case in the Prussian project it would be difficult to show as a mere question of theory that its establishment did not constitute an evasion of the Declaration of Paris."[1]

The formation of the Prussian volunteer navy in 1870 was, however, abandoned, but the incident clearly proved that the first Article of the Declaration of Paris could not be viewed as the last word on the subject.

The methods pursued by states since 1870 for increasing their fighting fleet in case of war differ in important particulars from the scheme proposed by Prussia in 1870. Russia in 1877 created a volunteer navy ; the ships were purchased by a patriotic association and given to the State. They were placed under the command of an officer of the Imperial Navy and the crews were under military discipline. The institution still exists, and in time of peace, though chiefly engaged in the public service, the ships fly the merchant flag. Such vessels are in fact incorporated into the Russian navy, and are not merely merchant ships liable to be converted into ships of war on the out-

[1] W. E. Hall, *International Law* (5th edition), p. 528.

break of hostilities. To this latter class belong certain ships belonging to the great French mail lines. France has arrangements whereby certain companies construct their vessels in accordance with the plans of the French Admiralty so that they may be suitable for incorporation into the navy on the outbreak of war, and Great Britain and most, if not all, of the great naval Powers, have arrangements or power to make arrangements with shipping companies to turn fast steamships into cruisers when war breaks out. In some cases also, as in France, subsidies are given to these companies on condition that certain ships shall be specially constructed with a view to conversion. Under a German law of 1873 shipowners must place the ships and vessels at the disposal of the military authorities for war purposes from the day of mobilization.[1]

Auxiliary cruisers, i.e. converted merchant ships, were used in the Spanish-American and Russo-Japanese wars.[2] It was during the latter war that the question of the status of volunteer ships was raised in consequence of the doings of the Russian volunteer cruisers *Peterburg* and *Smolensk*. These two vessels were part of the volunteer fleet in the Black Sea, and on the 4th and 6th July, 1904, respectively they

[1] H. Wehberg, *Capture in War on Land and Sea*, p. 116.

[2] Italy is using them in the present war with Turkey.

passed through the Bosphorus and Dardanelles flying the flag of the mercantile marine. (These Straits under the Treaties of Paris, London and Berlin are closed to vessels of war. This is the "ancient rule of the Ottoman Empire.") The vessels also passed through the Suez Canal under the same flag. When in the Red Sea they hoisted the flag of the Imperial Russian Navy and the *Peterburg* captured the *Malacca*, a P. and O. mail steamer. Ultimately after vigorous protests of the British Government the *Malacca* was released and these vessels were ordered to haul down the flag of the Imperial Navy and to cease to act as cruisers; at the same time Russia gave assurances that the volunteer fleet would not again 'be utilized for visitation and seizure of neutral ships in the Red Sea." In an interview at the time M. Neratoff, of the Russian Foreign Office, is reported as saying: "The questions as to the place where this transformation should be made had not been settled when certain ships passed the Dardanelles as merchantmen, otherwise the Turkish authorities would not have let them through. The commanders of the *Peterburg* and *Smolensk* were wrong in stopping neutral vessels without waiting for further orders." [1]

[1] *The Times*, July 26, 1904. For an account of the career of the vessels see T. J. Lawrence, *War and Neutrality in the*

II

Before passing on to the further examination of the question of the conditions under which merchantmen may be converted into cruisers, one point may here be noticed which does not appear to have been made in discussing this subject. These two vessels got themselves and their State into trouble through their zeal in interfering with *neutral* ships; had they confined their attention to Japanese ships only would other states have been justified in treating them as pirates, and would Japan have been justified in treating them as unlawful belligerents? There is no doubt whatever that a merchant ship attacked by an enemy cruiser has a perfect right to defend itself, and, if strong enough, to capture its assailant. The capture will be a good one for the purpose of changing the ownership and rendering the crew of the captured cruiser prisoners of war. Section 39 of the Naval Prize Act of 1864 recognizes the legality of capture by uncommissioned ships: "Any ship or goods taken as prize by any of the officers and crew of a ship other than a ship of war of Her

Far East, pp. 205–17; F. E. Smith and N. W. Sibley, *International Law as Applied in the Russo-Japanese War*, Chap. ii.; A. S. Hershey, *International Law and Diplomacy of the Russo-Japanese War*, Chap. v.

Majesty shall, on condemnation, belong to Her Majesty in Her Office of Admiralty."

But there is also authority from both British and American sources for saying that "non-commissioned vessels of a belligerent nation may not only make captures in their own defence, but may, at all times, capture hostile ships and cargoes, without being deemed by the law of nations to be pirates, though they can have no interest in the prizes so captured."[1] This statement from a well-known work published before the Declaration of Paris does not stand alone. The most recent edition of Wheaton contains the following: "It must probably be considered as a remnant of the barbarous practice of those ages when maritime war and piracy were synonymous that captures made by private armed vessels without a commission, *not merely in self-defence, but even by attacking the enemy*, are considered lawful, not indeed for the purpose of vesting the enemy's property thus seized in the captors, but to prevent their conduct from being regarded as piratical, either by their own Government, or by the other belligerent state. Property thus seized is condemned to the Government as prize of war, or as these captures are technically called, Droits of Admiralty."[2]

[1] Story on *Prize Courts*, edited by F. T. Pratt (1854), p. 35.

[2] Atlay's edition, § 357. The learned editor does not

Dr. Hannis Taylor in effect repeats Wheaton's words, adding, "In the absence of a commission, a right of search and capture does not exist as against neutrals."[1]

Dr. T. A. Walker writes as follows: "An ordinary uncommissioned merchantman, belonging to a belligerent state may, of course, resist capture, and therefore also seize in self-defence, but ought not in general to attack. If, nevertheless, an uncommissioned master elect to lay aside his non-combatant character and to attempt to make prize, he is, as between himself and the enemy Government, a lawful combatant, and there is no excuse for his treatment otherwise than as such."[2]

On the other hand, Hall takes up what is surely the correct attitude having regard to modern developments when he says:—

"If there was ever anything to be said for this view [i.e. the right of a non-commissioned ship to attack] and the weight of practice and legal authority were always against it, there can be no

append any note intimating dissent from or qualification of this statement; similarly in Dana's edition. (The italics are mine.)

[1] *International Public Law* (1901), p. 497.

[2] *Science of International Law*, p. 268. See also Halleck's *International Law* (4th edition, 1908), vol. ii., p. 408.

question that it is too much opposed to the whole bent of modern ideas to be now open to argument. . . . Efficient control at sea must always be more difficult than on land ; if it was found that the exercise of due restraint upon privateers was impossible, *à fortiori* it would be impossible to prevent excesses from being indulged in by non-commissioned agents."[1]

The crews of merchantmen unless attacked " must not commit hostilities, and if they do so, they are liable to be treated as criminals just like private individuals in land warfare," says Professor Oppenheim,[2] and Messrs. Wilson and Tucker concur.[3]

To recognize in non-commissioned merchant vessels a right of attack, except in self-defence (the private law plea of *son assault demesne*) would be in my opinion a veritable return to " the barbarous practices of those ages when maritime war and piracy were synonymous."

[1] *Op. cit.*, p. 531. Dr. Croke in the case of *The Curlew* (1812, Stew. Adm. 326), said : " By the law of nations : If any private subjects cruise against the enemy without such commission [granted by the Sovereign or his authority] they are liable to be treated as pirates."

[2] *International Law*, vol. ii., § 85.

[3] *International Law* (1910), p. 243. See also Pasquale Fiore, *Droit International Codifié* (1911), § 1,625.

III

The Declaration of Paris abolished privateering (*la course*) and the history of maritime war since 1856 brings out clearly the need that was felt for a complete state control to be exercised over all and every ship purporting to act as a legitimate belligerent. This control was required in order that as between the belligerents themselves, and as between belligerents and neutrals, there should be security for the due observance of the laws of war in a spirit of humanity and good faith, and in order that the delicate operation of visit and search should be performed by those whose interests were patriotic and whose aims were other than pecuniary or even predatory.

The British Government in their complaint against the action of the Russian cruisers in the Red Sea did not question the right of belligerents to call their merchant ships to their assistance by incorporation in their navies. The principle had been accepted. One contention of Lord Lansdowne (apart fom the violation of treaties) was that a belligerent can only legally commission ships in her own harbours. This was a position which the Russian Government did not accept.

The whole question both of the conditions and place of conversion was discussed at the

Second Hague Conference and the Seventh Convention lays down the conditions subject to which conversion may take place; these Articles were agreed on without much difficulty.[1]

(1) "No merchant ship converted into a warship can have the rights and duties appertaining to that status unless it is placed under the direct authority, immediate control, and responsibility [2] of the Power whose flag it flies."

This Article lays down a principle which is a corollary of the Declaration of Paris. Its object is to give every security against a return under any disguise of privateering. Every ship claiming the character of a belligerent must be placed under the authority, the direct control and responsibility of the state whose flag it flies.

(2) "Merchant ships converted into warships must bear the external marks which distinguish the warships of their nationality."

This Article requires all converted merchant ships to bear the distinct marks of warships, i.e. the military flag if this differs from the commercial

[1] *La Deuxième Conférence Internationale de la Paix* (*Actes et Documents*), vol. i., p. 239; vol. iii., p. 1,090.

[2] Compare 4 H.C., 1907, Art. 3: "A belligerent party which violates the provisions of the said Regulations shall, if the case demand, be liable to make compensation. It shall be *responsible* for all acts committed by persons forming part of its armed forces."

flag, and the war-flag. The flag is the most important means of publicity and guarantee for neutrals, at once showing the military character of the ship.

(3) "The commander must be in the service of the state and duly commissioned by the proper authorities. His name must figure on the list of the officers of the military fleet."

This is to ensure the reality of the transformation and connexion with the state. The requirement that the commander must be in the service of the state and duly commissioned does not appear to mean that such officer must before he received his commission as commander of the converted merchant ship have previously been in the service of the state as a naval officer or officer of the naval reserve. This accords with the views expressed by the Royal Commission on Supply of Food in time of war which considered the subject at some length and reported: "There seems to be, however, no valid objection to the employment of vessels of the mercantile marine, provided that they shall have been duly incorporated into the belligerent navy, that their officers hold naval commissions, and that they are under naval orders and discipline."[1] It is not necessary for

[1] Report (1905), vol. i., p. 22.

the commander to have his commission on board or to possess documents showing the regularity of the transformation. It is sufficient that the commander must be in the service of the state and regularly appointed to his rank and command. The presence of guns on board was said to be the best evidence of his commission. There was a lengthy discussion on this point in the Committee of the Conference, and the Article as it stands was accepted as a compromise. The chief argument adduced for the necessity of the presence on board of the commission of the commander and of the ship was in the interest of neutrals. It was, however, pointed out that it is not the practice in several countries to issue written commissions to ships of war, while, in case of questions being raised as to the character of the vessel in a neutral port, it was stated that the neutral Government could always make inquiries of the Consul of the ship's state at the port. This assumes that there is always a Consul of a belligerent state in every port, and further—a very large assumption—that he will necessarily know of every conversion of a merchant ship. This will certainly not be possible in all cases if the conversion has taken place on the high seas, and the ship enters a port having concealed the evidence of her combatant character.

The question was also raised whether the

officers and crew need wear the ordinary uniform of the regular navy, but the Committee appeared to be of opinion that the important point in naval war was the external manifestations of the character of the ship herself, not of the individual members of her crew. In case of the exercise of visit and search it seems that the ship's boat should also fly the war flag or other distinctive sign.[1]

(4) "The crew must be subject to the rules of military discipline."

(5) "Every merchant-ship converted into a warship is bound to observe, in its operations, the laws and customs of war."

These two rules also are a further affirmation that the converted vessel is to be really a warship subject to all the duties which are the counterpart of the rights of a belligerent ship of war.

(6) "A belligerent who converts a merchant ship into a warship must as soon as possible announce such conversion in the list of the ships of its military fleet."

The object of this Article was to ensure the publicity of the transformation. The expression "as soon as possible" is a formula of compromise of which the members of the Hague Conference seemed particularly fond. It clearly does not mean

[1] *Le Deuxième Conférence*, etc., vol. iii., p. 1,008.

previous to conversion and there is nothing to require notification to neutrals of the fact of conversion.

It is important that the meaning of this Convention be fully noted, for these are the rules by which, according to Mr. Gibson Bowles, "the privateering declared abolished by the Declaration of Paris is in effect to be restored."[1] The conditions laid down in the Convention are in their main principles those which the United States district judge decided in the case of the *Yale* to be sufficient to justify the treatment of a merchant ship converted for the purpose of the war with Spain in 1898 into an auxiliary cruiser as a ship of war for the purpose of effecting a valid capture. This ship, which had previously been known as the *City of Paris*, was chartered by the United States under the provisions of an Act of Congress of March 3, 1891, and heavily armed; she was manned by her regular officers and crew, and in addition she took on board two naval officers, a marine officer and a guard of thirty marines, and she was "under the entire control of the senior naval officer on board." All the members of the ordinary crew of the *City of Paris* were held to be entitled to prize money as being "in the service" of the

[1] *Sea Law and Sea Power*, p. 128.

Government. "If they were not in the service of the Government," said Judge Bramley, "while performing that mission they incurred the hazard of being considered as pirates." [1]

IV

But *where* may the conversion of a merchantship into a cruiser take place? The place of conversion was the stone of stumbling and rock of offence on which both the Hague and London Conferences fell. At both, much the same arguments were used, but the method of procedure at the latter Conference, though the actual discussions are not reported, enables a clearer view to be taken of the great divergences of opinion which manifested themselves on this subject.

At the risk of repeating to some slight extent what I have already written on this subject [2] it may be of interest to summarize the arguments advanced for and against conversion on the high seas, to note the attempts at compromise and then to consider the practical steps that Great Britain and other states which hold similar views to those supported by her delegates may take to give effect to their contention, pending a further attempt at compromise or a decision of the International

[1] *Fed. Rep.*, vol. 89, p. 763.

[2] *Hague Peace Conferences*, pp. 315–321.

Prize Court whenever constituted, to which the Powers are apparently leaving the last word on the subject. The preliminary memoranda sent in by the Powers summoned to the London Naval Conference set forth their views on the questions for discussion. During the course of the Conference these were further supplemented and explained by memoranda circulated amongst the delegates.

Germany, France and Russia maintained an unlimited right of conversion of merchant ships into ships of war on the high seas. Austria-Hungary also maintained a similar right, but proposed certain restrictions. Italy admitted a theoretical right to convert on the high seas but took up an attitude of compromise.

Great Britain, the United States, Japan, Spain and Holland denied the right advanced by the above Powers. The ten Powers were therefore equally divided.

Let us consider first the standpoint of the Powers in favour of conversion on the high sea. They pointed out that there was only one principle common to all the memoranda submitted by all the Powers on the question of the place of conversion, and it was that there was no existing rule of International Law on the subject. Every State exercised sovereignty over all its ships on the high seas, this right was an unlimited one as to the

powers of dealing with such ships. There was no prohibition of conversion by any existing rule of International Law, and no argument of a legal character could be adduced to prohibit it in the future. It was admitted by Great Britain and other members of that group of Powers that a captor may at once turn a captured enemy ship into a ship of war on the high seas,[1] *à fortiori* a

[1] In the case of the *Georgiana* (1 Dods, 397 ; *English Prize Cases*, vol. ii. p. 193) Sir W. Scott in dealing with the recapture of the vessel said : " The vessel, it appears, was captured by an American frigate, and a number of men and guns were put on board under a commissioned officer, who was directed to cruise against British vessels, which he accordingly did, and succeeded in making three captures. . . . A good deal has been said with respect to the inconvenience that might arise to the commercial interests of this country, if the commanders of single frigates should be allowed to commission all the prizes they may happen to take. The argument *ab inconvenienti* may be very strong when applied to cases otherwise doubtful, but it is not to be intended that the law would introduce any inconveniences." (At pp. 196, 197, of 2 *English Prize Cases*.)

In the case of the *Ceylon* (1 Dods. 105 ; *English Prize Cases*, vol. ii., p. 133)we find the following : " It is no necessary part of the interpretation [of the words 'setting forth for war'] that she should have been carried into port and sent out with a formal and regular commission. It is sufficient if she has been used in the operations of war, and constituted a part of the naval and military force of the enemy. In the case of the *Castor* (Lords of Appeal, May, 1795), which ship was not carried into port, there was no regular commission ; for it was not in the

belligerent may convert its own ships. To forbid such conversion and compel a ship to return to its national port, would in certain cases where a ship was at the commencement of the war at a distance from a port of its own state be most detrimental. There was no question of re-introducing privateering, that was already guarded against by the Hague Convention on the subject of conversion of merchant ships into ships of war, and the same Convention also sufficiently safeguards neutral rights by the requirements of due authorization and state control which it demands from every converted merchantman. These converted vessels will not exercise any other right against neutral vessels than those already exercised by belligerent ships of war. They will visit and search, and if necessary capture or sink on the same conditions as ordinary warships. The legitimate and inoffensive commerce of neutrals will suffer no injury from the conversion, but it was admitted that all neutral merchant ships engaged in contraband trade or other operations forbidden by belligerents would suffer. The whole situation, it was contended, was on all

power of the Admiral to grant a regular commission . . . yet in that case, it was held that the ship, though commissioned by the Admiral alone, was sufficiently clothed with the character of a ship of war." (Cited by Sir W. Scott in the *Ceylon* at p. 136 of 2 *English Prize Cases.*)

fours with that of the sinking of neutral ships: it was a case for discussion, and it seems to have been suggested, rather than definitely stated, that if the principle of conversion on the high seas were admitted, the states advocating it might see their way to some restrictions as had been done in regard to that question. As against states that would accept conversion on the high seas if due notification of ships to be converted in case of war were previously made in time of peace, it was contended that a state did not know beforehand how many ships it would require to make use of in time of war; the requirements would vary with the circumstances, and besides, to give this information would reveal the state's plan of mobilization; moreover there is no legal distinction to be established between ships in national and neutral ports at the commencement of war.—The whole of this argument will at once be seen to be that of states who viewed the question primarily and almost solely from the belligerent point of view.

The standpoint of the group of Powers headed by Great Britain was primarily that of the neutral; the British Government considered that it was a question to be settled in reference to the rights of neutrals. It was fully admitted by the group opposed to conversion that there is no existing rule on the subject, but to admit the right to convert

on the high seas would, it was contended, clash with neutral rights and the principles of international comity. As for the argument that according to British and American doctrine a captor may at once convert a captured enemy ship into a ship of war on the high seas and *à fortiori* a belligerent may convert his own merchant ships it was pointed out in the British Memorandum that "the only cases decided in the British Prize Courts where any point of this kind has arisen, are some decisions on the rights of the original British owners of ships, which had been captured by the enemy, to restitution of their property on its subsequent recapture by the British force. The British Prize Act deprived the original owner of his right to restitution, if the vessel had been set forth as a ship or vessel of war. These cases deal only with the rights of the respective groups of British claimants, as determined by the Act of Parliament, and has, therefore, little or no bearing on the general question." [1] This statement appears to go too far, as the judgments in the cases cited though turning on the construction of the expression "setting forth for war," in a British statute clearly admit the validity of the conversion into ships of war on the high seas of prizes taken

[1] *Parliamentary Papers*, Miscellaneous, No. 4 (1909), p. 10.

from the enemy. However, at the Hague, Lord Reay introduced a proposal to define ships of war of the fighting class as follows: "The term "fighting ship" (*vaisseau de combat*) comprises every ship flying a recognized flag, armed at the expense of the state for attacking the enemy, the officers and crew of which have been duly authorized for this purpose by the Government of the state to which they belong. It shall not be allowable for any ship to assume such character except before her departure from a national port nor divest herself of it except after entry into a national port."[1] This proposal, and the attitude of the British Delegation both at the Hague and the London Conferences was an intimation that their Government was prepared to forego the right, if such existed, to convert a captured enemy merchant ship into a warship on the high seas, if the unlawfulness of conversion of national ships into ships of war on the high seas was recognized. Both parties agreed that there was no desire to reintroduce privateering, but it was urged that to allow conversion on the high seas would produce consequences more harmful than privateering from the point of view of peaceful neutral commerce. In the days of privateering merchant ships took into consideration the possibilities of being met by

[1] *La Deuxième Conférence*, vol. iii., p. 862.

privateers, but under the modern claims they would be exposed to visit and search by ships known by the neutral to be actually engaged on a regular mercantile line, and such ships might have been sailing in company with neutral merchant ships till a favourable moment came for them to throw off their peaceful character and assume the guise of cruisers. Such ships also which left their own country with the intention of being ultimately converted might continue to pass from one neutral port to another half way round the world, receiving everywhere the hospitality and treatment of a merchant ship, staying as long as they liked, running in to avoid capture by the enemy's cruisers, taking in unlimited supplies of fuel and food, and so passing on till they reached a favourable point where their belligerent character could be assumed, while using neutral ports as veritable bases of operations. If this were done a strong neutral would protest, friction would arise and there would be every probability of an increase in the number of combatants. The position of a weak neutral would be extremely difficult if conversion on the high seas were allowed. A belligerent whose ships had been sunk or captured by a converted merchantman who had issued as an innocent ship of commerce from a neutral port would make claims on the neutral for having provided her with fuel

and provisions to enable her to sally forth, while, if the neutral denied hospitality to belligerent merchant ships on the ground that they were potential ships of war he would also lay himself open to recrimination from the other belligerent; he would then be " between the devil and the deep sea." The difference between ships of war and merchant ships under a belligerent flag was at the present moment clear and well defined, and it was essential that this should be so, since their treatment in belligerent ports was entirely different. Any doubt as regards the character of a particular ship would place a neutral in a most difficult position as regards the exercise of its neutral duties. When a merchant ship clears from a port her papers must be in order and her destination appear: the possession of a secret commission enabling the captain to change the character of his ship at his discretion would render the possession of such papers valueless, and suspicion would be raised as regards every belligerent merchant ship capable of mounting guns. This is not the time, it was contended, to increase the restrictions on the security of neutral commerce or the freedom of navigation of peaceful shipping by the admission of claims which, whatever may be said in their favour, are quite new and not supported by any principle of international law.

We now see the two lines of argument, and it will be noticed that they are on different planes. The *media sententia* was sought especially by Italy and Austria; the British Delegation also made suggestions with a view of attaining a compromise on this very difficult subject on which all were agreed that it was highly desirable that the existing uncertainty should cease.

There would probably have been no difficulty in reaching an agreement on these principles:

I. That conversion of merchant ships into ships of war was allowable by a belligerent (*a*) in the belligerent's national ports or territorial waters; (*b*) in the territorial waters of his ally; (*c*) in ports or territorial waters of the enemy occupied by the belligerents' military or naval forces.

II. That conversion in a neutral port or territorial waters was illegal.

The following attempts at compromise were put forward in regard both to the place of conversion and the duration of conversion:

(*a*) Both at the Hague and the London Conferences Italy sought a way out of the *impasse* by proposing that conversion on the high seas should be limited to ships which left their last neutral port of departure or their national port *before* the commencement of hostilities, but that ships leaving their own territorial water *after* the outbreak of

war should be prohibited from changing their character, either on the high seas or in the territorial waters of another state. This, it was urged, would meet the case of belligerent merchant ships which found themselves when war broke out at too great a distance to enable them to return to a national port to effect the conversion. The commission might be sent to the commander by telegraph. Unless such ships carried their armament with them ready for use in case of need, the difficulties in the way of conversion of a ship which had left its home port before the outbreak of war would seem to be great. At the Hague the Italian proposition was accepted by the group of states opposing conversion on the high seas.

(*b*) Another suggested basis for compromise was put forward at the London Conference by the British Delegate. Notice should be given that certain ships belonging to a belligerent were destined for conversion either at the commencement of war or afterwards if the state thought such a measure necessary. To be of practical value such notification ought to be made before war commenced, and such ships should appear on the Navy List of the belligerent. Notification after conversion would have but a slight value to neutrals, as they could not bring such information to the knowledge of their merchant ships already

at sea, or in a port without a telegraphic station. The reply to this proposal has already been set forth in the arguments for conversion on the high seas.[1]

As regards reconversion there were two suggestions put forward :

(1) That a ship once converted should not be reconverted till the termination of the war ; this would meet the not impossible case of a ship leaving a neutral port as a merchant ship converting herself on the high seas, and then returning to the same, or entering another neutral port shortly afterwards as a merchant ship.

(2) No ship that had been converted could be reconverted until the lapse of fifteen days' notice announcing the fact of reconversion had been given by the belligerent state to neutral states.

The London Naval Conference might have reached an agreement on the subject of reconversion, but " it seemed very difficult to deal with this secondary aspect of a question which there was no hope of settling as a whole." [2]

We have set forth in detail the views of both sides, and the unsuccessful attempts at a compromise. It will be evident that the subject contains the germs of many serious difficulties in case

[1] See *ante*, p. 140. [2] Report of Drafting Committee.

war should break out between naval Powers before a settlement is reached. The ten Powers assembled in London in the winter of 1908–9 were equally divided, though two of the five which maintained the rule of conversion on the high seas showed a willingness to make concessions. Italy, except for the fact of her recognition of the right to convert on the high seas at the commencement of war, cast the weight of her arguments into the scale of the group which was against allowing conversion at all on the high seas.

V

The inability of states to settle the difficulty under discussion has some further consequences than those already adverted to, which will now be considered. It will produce the result that the Sixth Convention of 1907 regarding merchant ships in an enemy port at the outbreak of war will probably have a very limited application by reason of the difficulties of interpreting Article 5, which exempts from the operation of the Convention " merchant ships whose construction indicates that they are intended, to be converted into ships of war " ; [1] and owing also to the fact that the Convention itself is facultative not mandatory in

[1] See on the difficulties of construing this Article the writer's *Hague Peace Conferences*, p. 305.

character. "It is *desirable*" that belligerent ships in an enemy's port at the outbreak of war should be allowed to depart after certain days of grace have been allowed, says Article 1. Except for the fact that ships detained, other than those whose construction indicates that they are intended for conversion, will not be confiscated, the Convention will probably be limited in operation.

Another convention whose effect may be largely restricted is that part of the Eleventh Convention, 1907, which provides that the captain, officers and crew of captured enemy merchantmen are not to be made prisoners of war if, in the case of their being neutral subjects, they promise not to serve on an enemy ship while the war lasts, and in case of their being enemy subjects, they promise not to engage while hostilities last in any service connected with the operations of war. These provisions are not to apply to ships taking part in hostilities.[1] What are ships taking part in hostilities? In the absence of agreement as to the place of conversion how is the captor to be sure that the merchant ship he has seized is not a "marine hermaphrodite," a merchantman to-day a warship to-morrow? The ship's papers may be in order as a merchant ship, but the captain may have received

[1] Articles 5–8.

a secret commission to convert her as soon as he can get on board the armament necessary for the purpose, supposing that the guns are not already in the hold, or possibly at the time of capture he was on his way to a national port for the purpose of effecting the transformation.

The difficulties in the way of neutral states in complying with Article 8 of the Thirteenth Convention of 1907, which provides that a neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise or engage in hostile operations against a Power with which that Government is at peace have already been sufficiently dealt with.

There is a further factor to be taken into account in considering the situation produced by the continuance of the present uncertainty. Neutral goods on board an enemy merchant ship are free from capture under the Declaration of Paris. If the merchant ship were armed, the principles of the decision in the *Fanny* [1] would presumably be applied by British Prize Courts. Lord Stowell held in that case that neutral goods on board an armed enemy merchant ship were liable to con-

[1] 1 Dods 448.

demnation. This principle was not followed by the United States Court in the case of the *Nereide*,[1] but the strong dissenting judgment of Story in that case cannot be disregarded. A definite intimation to neutrals at the outbreak of war that all neutral cargo on an enemy ship which was found to be carrying armament, whether actually in position or not, would be condemned, would operate to deter neutral traders from entrusting their goods to the carriage of any enemy ship where there was any possibility or probability of its conversion into a ship of war.

The Naval Conference of London was able to settle one question on which there had been for a long time a considerable divergence between the views of Great Britain and other maritime Powers in regard to the subject of Convoy. It was agreed that a neutral under the convoy of a warship of her own nationality is exempt from search. We may, so long as the present uncertainty continues in regard to conversion of merchant ships, expect to see a revival of this method of protection of their commerce by neutral states. The cruiser, whether one of the belligerents' regular ships of war or whether a converted merchant ship, will by this means not be brought

[1] 9 Cranch 441. See also Dana's note on § 529 of his edition of Wheaton's *Elements of International Law*.

into direct contact with the captains of the neutral merchant ships, and so some of the inconveniences already adverted to may in some slight degree be averted. But this method of protection of neutral commerce is at the best a clumsy and expensive proceeding and affords but the slightest amelioration of existing difficulties. Belligerent merchant ships may also find it necessary to resort to convoy for their protection; this again would be a great limitation on belligerent commerce. "It may be reasonably expected in coming naval wars that steamers of the great lines will be armed so as to defend themselves from attack, rather than seek convoy." [1] If so, the question already raised by the case of the *Fanny* will be of vital importance to neutrals whose goods such liners are carrying.

Neutrals have however one important weapon of defence which may be used by such of them as deny the right of conversion of merchant ships into warships on the high seas in the denial of all rights of hospitality to the ships so converted. Entry into neutral ports by belligerent war ships is entirely under the control of the neutral states; they may forbid it altogether or impose such restrictions as they think fit. The closing by neu-

[1] F. Snow, *International Law* (edited by C. H. Stockton under the direction of the United States Navy Department, 1898), p. 83.

tral states of all their ports and territorial waters to merchant ships converted on the high seas, and the enforcement of the rules required to be observed by belligerent warships against all merchant ships unconverted, but which are known to be subsidized or under contract for conversion in case they are needed, would be legitimate acts of self-protection by neutral states against belligerents acting on principles which are contrary to those held by the neutral.

Lastly, there remains one possible step for a neutral to take, namely to refuse to recognize the exercise of the right of visit and search by all converted merchantmen whose conversion has not been effected in their national ports or in those of their ally or in ports or territorial waters in which they were in occupation.

But in my opinion to refuse belligerent rights to ships converted on the high seas would be an extreme act, and there is weighty authority against it. The following was the opinion of Sir William Harcourt, who had before him the case of the Confederate cruisers who had no ports in which they could be commissioned: "A strong feeling has recently grown up against the recognition of belligerent commissions granted to vessels on the high seas, by which such vessels become at once raised to the position of lawful belligerent cruisers.

. . . It seems to me that for all reasons it is wise to discourage such a practice. As there is no rule of international law which forbids such delivering of commissions on the high seas, we cannot of course refuse to recognize the title of such a cruiser to all the legitimate rights of war in places beyond our jurisdiction. But we are masters of our own actions and our own hospitality within the realm. Though, therefore, we cannot dispute the validity of such a commission on the high seas, or the legality of capture made by such a vessel, we may refuse to admit to our own ports any vessel which has not received its commission in a port of its own country. By so doing we shall be acting strictly within the principle of the law of nations, and our example would . . . tend to repress the practice altogether." [1] Professor Montague Bernard's opinion was that "undoubtedly a vessel may be built, equipped, armed, commissioned and employed as a cruiser, without ever having entered a port of the nation under whose flag she sails. Whether it is just and expedient for all nations that this should be prohibited, is an open question: at present it is not prohibited." [2]

[1] *Report of the Neutrality Laws Commission*, 1868, p. 11.

[2] *British Neutrality*, p. 401. Dr. Baty, who cites the views of Sir William Harcourt and Professor Bernard, thinks "there

These opinions, it must be noted, apply to *cruisers*. The refusal to acknowledge the right of conversion on the high seas by a state, or group of states, would be a question of policy and power. Strong neutral states might succeed where the attempt would be fatal to weak ones. A belligerent might feel it more politic to comply with neutral demands while denying their legality, or to conform to neutral regulations under protest, than to extend the region of war and add another enemy to the one he was already fighting. The protest of Germany in the case of the *Bundesrath*, though the British Government did not admit the legality of the claims made, was in effect successful, while the protest of Great Britain in the cases of the *Peterburg* and *Smolensk* procured the withdrawal from the seas of these two cruisers, and prevented the conversion of any more merchant ships on the high seas during the course of the Russo-Japanese war.

The failure to reach agreement at the Hague was attributed by the French Delegation to 'the divergences of interests resulting from the geographical situation of certain countries." [1]

is no reason why the granting of a commission should not be done on the ocean" (*Journal of the Society of Comparative Legislation*, New Series, No. xiv. (1905), p. 216).

[1] *Livre jaune*, p. 98.

The principle of unrestricted freedom for conversion on the high seas was supported by states with considerable merchant navies, and with but a small number of ports or coaling stations in distant parts of the world. There had been no changes in the geographical and political situations of these states between 1907 and 1909 and the same cause which operated in the former operated in the latter year.

M. Ruy Barbosa, the eloquent representative of Brazil at the Hague Conference, was right in drawing attention to the extremely delicate character of the question of conversion of merchant ships. He delivered two impassioned speeches on the relation between politics (in the widest sense of the term) and international law :[1] " La politique est l'atmosphère des Etats, la politique est la région du droit international." *La politique* in the sense of M. Barbosa was undoubtedly the reason why for a second time states failed to resolve the difficulties involved in the place of conversion of merchant ships into warships. Privateering has been abolished, but the spirit which actuated states in granting letters of marque in order to increase the number of ships capable of inflicting injury to the enemy's com-

[1] *La Deuxième Conférence, etc.*, vol. iii., pp. 815, 818.

merce is increasingly manifesting itself in certain states. Reference has been already made to the movement in France and other countries for a denunciation of the first Article of the Declaration of Paris. Here, as in other directions of the world movements, we see two strikingly dissimilar and opposing forces at work. A large and strong party is to be found in many states working for the exemption from capture of private property at sea, while signs are not wanting that there is also a body of opinion—how strong it is difficult to say—which would bring into the combat every ship capable of doing injury to the adversary's navy and commerce. All states—not only the great maritime states—are now willing and desirous of availing themselves of the assistance of ships other than those which figure in their navy lists. Some of the worst evils of the old system of privateering have undoubtedly been checked by the acceptance of the rules laid down in the Hague Convention on this subject, but from the neutral point of view the evils which may arise from unrestricted freedom of conversion of merchant ships into warships on the high seas will be even more serious than the majority of those which existed under the old system of privateering.

Dr. Hans Wehberg gives the numbers of merchant ships of more than 18 knots speed which

Great Britain, Germany, the United States, France and Russia have at their disposal and adds: "Vessels of less speed can of course be used as auxiliaries, though in this case obviously only for such subsidiary military purposes as the carrying of men, ammunition and supplies, scouting and hospital duties and use in guerilla warfare against the enemy's commerce." [1] "Scouting" and "guerilla warfare"—particularly the latter—were just the objects for which privateering was encouraged. In land warfare it has been found extremely difficult to regulate guerilla warfare, and the questions raised in connexion with it cannot be said to be finally settled even now; but land warfare is, after all, an affair of the belligerents themselves, whereas in naval war there are neutral interests to be considered.

The states who supported the right to convert merchant ships on the high seas clearly put in the forefront of their considerations their own potential rights as belligerents, and so they "refused to make any concessions or to abate one jot from the claim to the absolutely unfettered exercise of the right which its advocates vindicate as a rule forming part of the existing law of nations." [2] Diplo-

[1] *Capture in War*, p. 116.

[2] *Parliamentary Papers*, No. 4 (1909), p. 101 (Report of British Delegation).

macy, it has been said, is policy conducted by means of paper-money, but the relation of the notes to the gold reserve is never absent from the calculations of the negotiators. The object of all diplomacy is to avoid cashing the drafts, in other words having recourse to armed force. The policy of those who contend for the unfettered right to convert on the high seas is actuated by the feeling that if war comes they will have the means to cash the notes, that is to put their claims into full execution, for war is the continuation of State policy by other means when diplomacy has failed. In my opinion both the Second Hague and the London Conferences were in the main belligerent Conferences in the sense that belligerent claims won diplomatic victories over those of neutrals. Neutral rights reached their high-water mark in the Declaration of Paris. The failure to reach agreement on the subject of the place of conversion of merchant-ships was caused by the refusal of states to accept a compromise on a question of policy which they believed themselves able to carry out in case they were belligerents, and which they considered of too great value to permit of compromise.

VI

Both parties appear to be willing to have the legality of the conversion on the high seas left for

the ultimate decision of the International Prize Court, if and when it shall be established, as regards the rights of neutrals, and Sir Edward Grey, in the discussion on the Naval Prize Bill in the House of Commons on December 7, 1911, admitted the possibility of a decision being unfavourable to a neutral vessel appealing against condemnation on the ground that the captor was a merchantman converted on the high seas. "But," he added, "we shall not recognize the decision of the International Prize Court on what may be done with regard to neutrals in restricting us in our rights when we are belligerents." In the course of the same speech he also said: "We have always said that we shall in those circumstances deal with those vessels converted on the high seas as we think fit." [1]

In the course of the debate on the Naval Prize Bill in the House of Commons on November 3, 1911, the Solicitor-General similarly is reported to have said: "When this country is at war it claimed the right to deal with an enemy who used converted merchantmen as it pleased, when it pleased, and how it pleased." The words as they stand are ambiguous, but they would seem to have the meaning that Great Britain reserves

[1] *The Times*, December 8, 1911.

the right in some cases to refuse to acknowledge as lawful belligerents merchant ships converted into ships of war on the high seas, even though in other respects they conformed to the provisions of the Hague Convention. Sir Robert Finlay, in the course of the same debate, said: "You could not treat them as pirates." Before examining these two opinions, one further point of importance in the discussion of conversion on the high seas may be dealt with. It may be contended that the supply of merchant ships suitable for conversion in any mercantile marine except that of Great Britain, is not large enough to render their conversion into cruisers a practical danger, either to neutrals or to belligerents. It is true that a cruiser or commerce-destroyer requires to be considerably faster than the ships she intends to attack, and the great majority of merchant ships do not exceed 16 knots an hour, and are in fact well below this rate of speed. According to Lloyds Register of Shipping for 1911–12 Great Britain has 76 merchant ships of 3,000 tons and upwards of 17 knots speed and upward, Germany has 10, France 20, the United States 31, and other states in a similar proportion, say, 1–2 per cent., of their whole mercantile marine. It may therefore be admitted that the numbers of ships suitable for conversion for the purpose of cruisers or commerce-

destroyers is not large, still there are enough, especially if those of 16 knots are included, to make the situation extremely dangerous not only to belligerents but to neutrals.

But cruisers are not the only kind of ships of war into which merchant ships are capable of being converted. Almost any ship can be used as a mine-sweeper; great speed is not essential to a mine-layer. The deadly work of the latter, at any rate as regards floating mines, can be done more effectively, because more secretly, by an innocent-looking merchant ship whose death-dealing cargo can be easily stowed so as to escape notice in a neutral port. All the arguments used against conversion on the high seas, both from a belligerent and neutral standpoint, apply with greater force to merchant ships used for such a purpose, a purpose which may be fatal not only to belligerent warships, but also to neutral shipping.

The extremely unsatisfactory condition of international law on the subject of mines is not sufficiently appreciated by the world at large. The Convention signed at the Hague in 1907 while prohibiting the use of anchored mines which do not become innocuous on breaking adrift, and of floating mines which do not become harmless within an hour at most after those who laid them have

lost control over them, and providing that where mines are employed every possible precaution must be taken for the security of peaceful shipping, recognizes that all states do not at present own perfected mines of the description contemplated in the Convention, but contains no limit of time within which they are to be made to answer to these requirements, though states undertake to do this as soon as possible. It is unknown how many states have found it possible to make the change in their material to satisfy these conditions. Moreover the Convention contains nothing by way of limiting the place where such mines may be laid, there is nothing in it to prohibit the laying of mines on the high seas, though the British and several other Plenipotentiaries strove hard to obtain the insertion of such a prohibition. The British Delegate on signing the Convention made the very proper reservation that the mere fact that a proceeding is not prohibited is not to be taken as equivalent to an acceptance of its lawfulness; no other Delegate did so, but the preamble clearly indicates that the Convention is far from being complete as it introduces the Convention "until such time as it may be found possible to formulate rules on the subject which shall ensure to the interests involved all the guarantees desirable." The officers and crew of a merchant

ship which was converted into a mine-layer on the high seas, after having enjoyed the security of neutral ports till she could safely sally forth to lay a mine-field on some parts of the ocean to be traversed by a portion of the enemy's fleet, would, if subsequently captured by one of the enemy's cruisers, incur the very probable risk of finding themselves dealt with as illegitimate combatants, even though the captain should be able to produce his commission, and show that in other respects he had complied with the conditions of the Hague Convention as to the conversion of merchant ships into warships. The Solicitor-General's claim for his country to deal with such a converted merchantman "as it pleased, when it pleased, and how it pleased" might possibly be relied on here. Such an occurrence as that suggested may never occur, and it is to be hoped never will; still it is not impossible, but should be made so by a definite rule of international law. But where the case is one of conversion on the high seas of a liner or fast merchant ship into a cruiser or commerce-destroyer complying with all the requirements of the Hague Convention the opinion of Sir Robert Finlay that she could not be treated as a pirate would probably be generally acted upon, though even in this case circumstances may be imagined in which her captor might have strong inducement for taking

severe measures, especially if she had been sinking prizes. The same causes which produced the summary treatment by the Germans of the *Franc-tireurs* in the Franco-German war, might not improbably in some great naval war of the future have similar results. If the official and professional combatants are to treat non-combatant persons with leniency, and carry out the principle of sparing unarmed enemy subjects in person, property and honour as much as the exigencies of war allow, there must be no hazy line of demarcation between combatant and non-combatant.

The British Delegates both at the Hague and London Conferences rightly maintained in the interest of the peace of the world a position on the conversion of merchant ships on which the only possible compromise should be that suggested by Italy, namely, that the only cases of conversion on the high seas to be recognized should be where ships left their national ports before war broke out. If this were agreed to, the question of re-conversion would afford no difficulty.

V

THE OPENING BY BELLIGERENTS TO NEUTRALS OF CLOSED TRADE

THE OPENING BY BELLIGERENTS TO NEUTRALS OF CLOSED TRADE

I

AMONGST the problems raised at the Naval Conference of London in connexion with "Enemy character" was the question whether a ship should be deemed to lose her neutral character if she engaged in a trade which before the war was closed to any but the national belligerent's flag. Great Britain has formerly, under the well-known "Rule of 1756," claimed to treat such ships as enemy ships, and several other Powers at the Naval Conference were disposed to take the same view. "Strong opposition was, however, encountered on the part of the majority of the Delegates, and as no unanimous solution could be arrived at, it was agreed to leave the question open, to be ultimately decided by the International Court if brought before it." [1]

There is still a great divergence of opinion

[1] *Parliamentary Papers*, Miscellaneous, No. 4 (1909), p. 100. Report of the British Delegates to Sir Edward Grey.

on the meaning of the term "enemy character" in relation to the character of goods on board ship, domicile and nationality of the owner being the criteria of the two opposing schools of jurisprudence; but the proposal above referred to not only touches this subject but is also intimately connected with "unneutral service" and the right of capture of private property at sea. Before dealing with the discussions at the London Conference, it will be well to consider the origin and history of the principle which failed to meet with the unanimous approval of the Naval Powers there assembled. The origin of the Rule of 1756 on which the proposal above referred to is based is thus stated by Wheaton:—

"During the war of 1756, the French Government, finding their trade with their neutral colonies almost entirely cut off by the maritime superiority of Great Britain, relaxed their monopoly of that trade, and allowed the Dutch, then neutral, to carry on the commerce between the mother-country and her colonies under special licences or passes, granted for this particular purpose, excluding at the same time all other neutrals from the same trade. Many Dutch vessels so employed were captured by the British cruisers, and together with their cargoes were condemned by the Prize Courts, upon the principle that by such

employment they were in effect incorporated into the French navigation, having adopted the commerce and character of the enemy and identified themselves with his interests and purposes." [1]

The principle thus enunciated was extended during the French Revolutionary War of 1793, when France opened to neutrals not only the trade with her colonial possessions, but also her coasting trade. Great Britain issued orders to her naval commanders denying to neutrals the right to carry French goods between the mother-country and her colonies, or to engage in the coasting trade, and furthermore exposed them to penalties for carrying neutral goods from their own ports to those of a belligerent colony, or from any one port to any other belonging to the belligerent country. This extended interpretation shutting out neutrals from trade between their own ports and ports of the enemy must be condemned; it bore with great severity on neutrals, especially as it was further amplified by Lord Stowell's introduction of the doctrine of "continuous voyage."

[1] *Elements of International Law*, § 508, see also W. E. Hall, *International Law* (5th ed., p. 634. See on the subject generally the cases of the *Immanuel* and *Wilhelmina* and notes thereon and authorities cited in Tudor's *Leading Cases on Mercantile and Maritime Law* (3rd ed.), pp. 948–980, also T. D. Woolsey, *Introduction to the Study of International Law* (1874), p. 461, J. Westlake, *International Law, War*, p. 252.

"Under this new law of the ocean," said Jefferson, "our trade to the Mediterranean has been swept away by seizures and condemnations, and that in other seas has been threatened with the same fate." [1] The doctrine of the British Prize Courts was strongly opposed by the United States, and was examined in a book written by Madison, entitled *An Examination of the British Doctrine which subjects to capture a neutral trade not open in time of peace.* Modern French and German publicists such as Bluntschli, Gessner, Geffcken, Kalterborn, Perels, de Boeck, Hautefueille, Ortolan Calvo and others also oppose it,[2] and though it is supported by many English and some American jurists, it was, during the latter half of the nineteenth century, often discussed as a matter of antiquarian interest by reason of the changed policy of nearly all states in regard to their colonial trade. Hall, however, pointed out that the question has not necessarily lost its importance to the extent sometimes thought.[3] Even the *British Manual of Naval Prize Law* issued in 1888 treated the Rule as dormant, and naval commanders were informed that they were not to enforce without special instructions the rule that neutral

[1] H. Taylor, *International Law*, p. 632.

[2] Bonfils-Fauchille, *Droit International*, § 1,534.

[3] *International Law* (5th ed.), p. 637.

vessels are liable to detention for engaging in a trade which in time of peace was closed to vessels other than those of the enemy state.[1]

The first naval war of the twentieth century showed that the doctrine of the British Prize Courts was very much alive. Japan and Russia seem to have taken the same view of the intervention of neutral merchant ships in trade opened to them by a belligerent after the outbreak of war as had been taken by Sir William Scott and other Judges of the English Courts. The principle of the Rule of War of 1756 was found to be applicable to the circumstances of the war of 1904–5, as will be seen from the following cases.

In July 1905 the German vessel *Thea*, chartered by Japanese subjects, was captured by a Russian squadron and sunk, and the Russian Prize Court at Vladivostok subsequently justified this action on the ground that the ship had availed herself of the Japanese decree of February 2, 1904 (that is four days before Japan broke off diplomatic relations with Russia), opening the coasting trade to ships of all nations. (The facts of the case are, however, not very clear, and perhaps too much stress must not be laid on it.) [2]

[1] Article 141.

[2] T. J. Lawrence, *War and Neutrality in the Far East*, p. 260. See A. S. Hershey, *International Law and Diplomacy of the Russo-Japanese War*, p. 173 *n.*

Similarly, the Japanese Prize Court condemned the United States Steamship *Montara* for carrying on a trade under licence of the Russian Government which was closed to other nations in time of peace. The reasons for the condemnation are thus set forth by the Court: "When a belligerent gives a licence to certain ships for trade in a district closed to foreign vessels in time of peace, the other belligerent may confiscate such vessels, even of neutral ownership, voyaging under such licence, as having the enemy character, and also the goods on board belonging to enemy persons. This is recognized by the precedents and theory of international law." [1] Precedents can certainly be found in the judgments of Sir William Scott in the cases of the *Emanuel* [2] and *Immanuel*,[3] in support of the judgments (assuming the correctness of the facts) in both of the cases just quoted; it remains to be seen how far they are in accordance with the "theory of international law."

[1] S. Takahashi, *International Law applied to the Russo-Japanese War*, p. 636.

[2] 1 *C. Rob. Rep.*, p. 296; 1 Roscoe's *Eng. Prize Cases*, p. 141.

[3] 2 *C. Rob. Rep.*, p. 186; 1 Roscoe's *Eng. Prize Cases*, p. 217.

II

Amongst the topics proposed for the consideration of the London Naval Conference and enumerated in Sir Edward Grey's Circular of February 27, 1908, was "the rules as to neutral ships or persons rendering unneutral service" (*assistance hostile*). The Memoranda sent in by each of the Powers were, with two or possibly three exceptions, silent on the subject of intervention of neutral merchant-ships in a trade closed by a belligerent to all but its own subjects in time of peace, but opened to neutrals in time of war. The two exceptions were the Memoranda of Germany and Great Britain.[1] In the German Memorandum the principle of the Rule of 1756 was clearly enunciated in connexion with "Unneutral service"; in the British, it was referred to in connexion with the subject of "Continuous voyage."

Article 3 of the German Memorandum contained the following: "The neutral or enemy character of a merchant ship is determined by the character of the flag which she flies.

[1] The Japanese Memorandum appears to have reference to neutral ships taking part in a closed trade, as under the heading of enemy character the following ships are described as being enemy, "(*b*) those sailing under the enemy flag or with an enemy licence" (*congé*), *Parliamentary Papers*, Miscellaneous, No. 5, p. 50,

A ship flying a neutral flag can nevertheless be treated as an enemy ship :—

1. . . .

2. If she is making at the time and with the sanction of the enemy government a voyage which she has only been permitted to make subsequently to the outbreak of hostilities or during the two preceding months." [1]

The British Memorandum dealing with the application of the doctrine of continuous voyage to prohibited trade contained the following :—

" When a neutral vessel undertakes in time of war a voyage which is not open to her in time of peace, as, for instance, if she engages in a trade reserved exclusively in time of peace to vessels of enemy nationality, the interposition of a neutral port in the course of the voyage will not exempt her or her cargo from liability to condemnation (*William* 5, *C. Rob.* 385, 1. *E.P.C.* 505 ; cases cited in the judgments in the *Maria* 5, *C. Rob.* 365, 1. *E.P.C.* 495, and the *William, supra*)." [2]

The Bases for discussion prepared by the British Foreign Office contained no direct mention of the subject of the opening of closed trade by a belligerent to neutrals on the outbreak of war.

[1] *Parl. Papers*, Misc. No 5 (1909), p. 2.

[2] *Parliamentary Papers*, Miscellaneous, No. 4 (1909), p. 8, No. 5 (1909), p. 37.

Base 34 was in the following terms:—"Neutral merchant ships entirely or specially in the service of the belligerent enemy are subject to the same treatment as if they were enemy merchant ships." [1]

At the fifth meeting of the Conference on January 15, 1909, the German delegate, Herr Kriege, introduced a more elaborate proposal on the subject of unneutral service, but the paragraph on the opening of a closed trade by a belligerent remained the same. Herr Kriege in explaining the German proposals said in reference to this subject: "Lastly, we have reproduced a provision which is found particularly in English law, and to which allusion is made in the English Memorandum in the Chapter relating to 'Continuous voyage.' According to this provision, ships which are at the time, and with the sanction of the enemy Government, making a voyage which they have only been permitted to make after the outbreak of hostilities or during a certain period preceding that date, are to be regarded as enemy ships and treated accordingly. But since such a rule is not found in the laws of all the Powers, we do not insist on its being inserted in the Convention. We leave this question to the decision of the Conference and are willing to withdraw our proposition, if the

[1] *Parliamentary Papers*, Miscellaneous, No. 5 (1909), p. 107.

Conference takes another view on the subject." [1] It was proposed to adopt the German text as the base of discussion, but the members of the Committee decided to adjourn so as to allow of further study both of the proposal and of the printed *Exposé* of Herr Kriege.

Three days later the discussion was resumed and each of the cases mentioned in the German proposal were considered, and an exchange of views took place in reference to the ships licensed by a belligerent to take part in the closed trade. On the one hand it was contended that the case did not come within the category of unneutral service (*assistance hostile*), whilst on the other, it was urged that neutral ships must be refused the right to undertake trade in time of war, such, for example, as the coasting-trade carried on in time of peace exclusively by the nationals of the belligerent, without thereby losing their neutral character. The British and French Delegates reserved their opinion, and the matter was deferred for further consideration.[2]

On February 10, the draft Articles on Unneutral Service were presented by the *Comité d'examen* and adopted, and now form Articles 45–47 of the

[1] *Parliamentary Papers*, Miscellaneous, No. 5 (1909), pp. 190, 279 and Annex, p. 247.

[2] *Parliamentary Papers*, Miscellaneous, No. 5 (1909), p. 193.

Declaration of London, and the Report of the Committee on the subject under consideration is as follows :—

"It was proposed to treat as an enemy merchant vessel a neutral vessel making at the time, and with the sanction of the enemy Government, a voyage which she has only been permitted to make subsequently to the outbreak of hostilities or during the two preceding months. This rule would be enforced notably on neutral merchant vessels admitted by a belligerent to a service reserved in time of peace to the national marine of that belligerent—for instance the coasting trade. Several Delegations formally rejected this proposal, so that the question raised remains an open one.[1]" This is further emphasized by the second paragraph of Article 57 of the Declaration itself, which states in reference to "enemy character" of a ship: "The case where a neutral vessel is engaged in a trade which is closed in time of peace, remains outside the scope of, and is in no wise affected by, this rule."

The accounts of the discussion on this subject at the London Conference are meagre, no details being given of the arguments advanced or of the attitude of the various delegates on this question.

[1] *Parliamentary Papers*, ibid., pp. 320–21.

The position of Germany is however made clear as also is that of Great Britain. They assert the right to treat as enemies all neutral ships engaging in traffic closed in time of peace. The traditional hostile attitude of the United States to the rule of 1756 was maintained, and Rear-Admiral Stockton, one of the American Delegates, writes of the German proposal as follows :—" To this, objection was made formally and informally, and successfully, by the American Delegates, and by the countries having a system of ' Cabotage ' in principle not unlike our own. The revival of this doctrine was presented and urged by Great Britain, quoting from some American authorities in favour of its position. The importance of the question to us can be readily seen when we consider the extent of our present coasting trade on both oceans and the future development likely to follow after the opening of the Panama Canal, as well as the natural increase with time of our trade with our insular possessions in the West Indies and Pacific. The question has been left an unsettled one by the non-action of the Conference but should engage the consideration of our Government and be met by proper diplomatic negotiations or timely assertion of our position." [1]

[1] *American Journal of International Law*, vol. iii., p. 610.

III

The retention by some states of the restriction of colonial and coasting trade for their nationals, and the tendency under the increasing pressure of preferential tariffs, commercial competition and economic doctrines of a protective character for a further limitation of over-seas traffic, emphasize the revived importance of the Rule of 1756. Under the old colonial system trade between the mother-country and the colonies was confined to ships of that country, and in addition the coasting trade was generally restricted to national ships. The former is to-day generally open, but the latter trade is still frequently reserved to national ships, or only opened to foreign ships by virtue of ancient usage, treaties or reciprocity, though it is recognized that a state may confine its coasting trade to its own nationals; the term "coasting-trade" has, at any rate, in the United States received an interpretation far more extensive than its original meaning.[1] Not only the United States, but France and Russia still have very important trades closed to all but their own nationals.

The United States has always reserved trade between her Atlantic and Pacific ports to her own

[1] See L. Oppenheim, *The Meaning of Coasting-trade in Commercial Treaties*, 24, *Law Quarterly Review*, p. 328.

citizens, and in 1898 and 1899 trade between any of her ports and Porto Rico, the Philippine Islands and the Hawaian Islands was declared to be coasting-trade and as such reserved exclusively for American vessels. Such an extension of the meaning of the term "coasting-trade" is, in view of the treaty-rights of other states, open to criticism, and Professor Oppenheim considers it inadmissible. The whole of the sea-borne trade of the United States, between the Eastern and Western States, as well as her trade with her colonial dependencies, is therefore still a closed trade and liable to be affected by the operation of the Rule of 1756 or its modern counterpart. [1]

The French coasting-trade was reserved to French ships by a decree of September 21, 1793, and intercourse between France and Algeria was similarly reserved by a law of April 1889. This trade is not termed coasting-trade. In consequence of strikes at Marseilles in the spring of 1904 a proposal was made to enable the Government to issue a decree in exceptional cases suspending the operation of the law of 1889. Labour troubles having broken out, a law was passed on July 22, 1909, giving the Government power under exceptional circumstances temporarily to suspend

[1] See L. Oppenheim, *Op. cit.* and *Enemy Character after the Declaration of London*, 25, *Law Quarterly Review*, p. 381.

the operation of the law of 1889 and also the law of 1867 governing the commercial and maritime relations between France and Algeria and establishing a permanent Arbitration Council. Under this law, in case exceptional circumstances temporarily interrupt intercourse under the French flag (*a*) between one or several ports of France and the ports of Algeria, or vice versa, or (*b*) between one or several ports of France or Corsica, the existing laws may be suspended; provision is also made for modifying the conditions of trade between France, Algeria and Tunis.

Trade between France and Tunis is in law open in time of peace to ships of all nations, but owing to a high preferential tariff in favour of goods carried in French vessels, the trade is, in fact, confined to French ships.[1] It is a nice point whether such trade is a "closed" trade, and whether the reduction of the tariffs during a war so as to encourage neutral merchant ships to participate would bring such ships within the Rule of 1756.

Russia by Ukase of 1897 enacted that as from the year 1900 trade between any of her ports and Vladivostok should be considered coasting-trade and reserved exclusively to Russian vessels.[2]

[1] See F. Despagnet, *Droit International Public* (4th ed., by Ch. de Boeck), § 653 *quinto*.

[2] See on this subject generally, L. Oppenheim, *International Law, Peace* (2nd ed.,) p. 606.

IV

The Rule of the War of 1756 as applied to the colonial trade originated during the Seven Years' War, but the same principles had been previously applied to the coasting-trade of belligerents, and from the middle of the seventeenth century onwards there are numerous treaties on the subject, some allowing, some prohibiting the trade to neutrals in war-time.[1] The Rule is supported by many English writers, and some American. Among continental writers Heffter, though disliking it, treats it as fairly established.[2] It is from the judgments of Sir William Scott and from the famous pamphlet of Mr. James Stephen, *War in Disguise* (1805),[3] that the most effective arguments in favour of the principle of the Rule were drawn, and to these sources its modern supporters may still go, for the underlying principles are equally applicable to-day to the proposal of Herr

[1] W. D. Manning, *The Law of Nations* (ed. Sheldon Amos), p. 263.

[2] See W. E. Hall, *Op. cit.*, p. 637, *n.*

[3] "This pamphlet produced a great effect, and was supposed to have suggested the Orders in Council, the first of which was made in 1807. Brougham called him [Mr. James Stephen] the 'father' of the system thus adopted." (*Dict. of National Biography*, vol. liv., p. 162.)

Kriege as they were to the doctrines of the English Courts during the great French wars.

It is common ground to both the supporters and opponents of the Rule in its modern form, that neutrals are entitled to continue to carry on in time of war the trade with both belligerents which was customarily carried on by them before hostilities broke out,[1] subject to the limitations imposed by the belligerents in regard to certain places under blockade, in regard to certain goods known as contraband of war, and in regard to certain acts coming under the designation of unneutral service. On all three heads disputes arose; the practice of states differed considerably and belligerents sought to limit neutral trade by issuing long lists of contraband goods, and the introduction of paper blockades. Against these belligerent acts neutrals protested with vehemence and even by hostilities. "The duty of a neutral," wrote Lord Howick in a despatch of 1807 "is '*non interponere se bello, non hoste imminente hostem eripere*'; and yet it is manifest that lending a neutral navigation to carry on the coasting trade of the enemy is in direct contradiction to this definition of neu-

[1] "Mais si elles ne font que suivre tout uniment à leur commerce, elles ne se déclarent point par là contre mes intérêts; elles exercent un droit, que rien ne les oblige de me sacrifier" (Vattel, *Droit des Gens*, liv. iii., chap. vii., § 111).

tral obligation, as it is, in effect, to rescue the commerce of the enemy from the distress to which it is reduced by the superiority of the British Navy, to assist his resources and to prevent Great Britain from bringing him to reasonable terms of peace." [1] Sir William Scott in the *Emanuel* (1799) had used language of a similar character: "As to the coasting-trade (supposing it to be a trade not usually opened to foreign vessels), can there be described a more effective accommodation that can be given to an enemy during war than to undertake it for him during his own disability?" [2] Again, in the *Immanuel* (1799) the same Judge, in dealing with the opening of the colonial trade, said: "The general rule is that the neutral has a right to carry on in time of war his accustomed trade to the utmost extent of which that accustomed trade is capable. Very different is the case of a trade which the neutral has never possessed, which he holds by no title of use and habit in times of peace, and which, in fact, can obtain in war by no other title than by the success of the one belligerent against the other, and at the expense of that very belligerent under whose

[1] *Parliamentary Papers respecting Austria, Denmark,* etc., 1808, p. 58 (cited by T. A. Walker, *Science of International Law,* p. 400).

[2] 1 *C. Rob. Rep.*, p. 126; 1 *Eng. Prize Cases*, p. 144.

success he sets up his title ; and such I take to be the colonial trade generally speaking." [1]

The judgments proceed on the ground that vessels allowed to participate in time of war in a trade closed to them in time of peace are thereby incorporated into the enemy commerce and become impressed with the enemy character.

The opponents of the Rule argue that each sovereign state may regulate its trade at will. It may close certain trades in peace and open them in war at pleasure. "To permit one belligerent to shut out neutrals from a commerce not being in contraband of war or in evasion of blockade would impose upon neutrality burdens so intolerable as to make war on its part preferable to peace." [2] It is further argued that neutral traders have every right to take advantage of every new opening for trade ; neutrals have no concern with the reasons why trade is opened to them, a neutral has a right to trade with the ports of the mother-country, why not between the mother-country and the colonies or between the various ports of the same country if opportunity offer ? The goods carried are in themselves innocent, and therefore not open

[1] 2 *C. Rob. Rep.*, p. 198 ; 1 *Eng. Prize Cases*, p. 218.

[2] Wharton's *International Law Digest*, vol. iii., 501, § 388, citing 2 *Lyman's Diplomacy of the United States*, chap. i. See also W. E. Hall, *Op. cit.*, p. 637.

to the objections of contraband trade. Professor de Boeck endeavours to cast ridicule on the Rule of 1756 by pointing out that a neutral collier accompanying a belligerent French fleet, and a neutral merchant ship which in time of war might be permitted to carry green peas from Algiers to France, would both be liable to the same treatment, namely capture and condemnation.[1] Taking first the cases put by Professor de Boeck it will be evident that the neutral ship is rendering considerable assistance to one of the belligerents in both cases. *Ex hypothesi* the French mercantile marine is unable to maintain the trade between Marseilles and Algiers, and the intervention of the neutral would be of great value in enabling the commercial intercourse between two parts of the state to be maintained. The assertion that the Rule of 1756 unjustly interferes with neutral commerce is quite unfounded. There is no interference with trade allowed to the neutral in time of peace, but the Rule does prevent neutrals from intervening in the contest to the advantage of one belligerent. The opening of a closed trade in time of war is a clear admission of weakness and a bid for the assistance of neutral merchant ships. It cannot be any more inequitable if the other belligerent

[1] F. Despagnet, *Droit International Public* (4th ed., by Ch. de Boeck), p. 1,108, *n.* 1.

treats any intrepid neutrals eager to reap advantage from such an opening as being in effect incorporated into the enemy's commerce than is the capture and condemnation of neutral traders endeavouring to break blockade.

States with small navies have in the past been anxious for the abolition of the right of capture of private property at sea, and for increasing the limitations on the powers of great naval powers. But in these, as in other matters, "circumstances alter cases," and this was clearly foreseen by the great American Chancellor Kent, who pointed out that "it is very possible that if the United States should hereafter attain that elevation of maritime power and influence which their rapid growth and great resources seem to indicate and which shall prove sufficient to render it expedient for her maritime enemy (if such enemy shall ever exist) to open all his domestic trade to enterprising neutrals, we might be induced to feel more sensibly than we have hitherto done the weight of the arguments of the foreign jurists in favour of the policy and equity of the Rule."[1] Another great American Judge, Mr. Justice Story, fully admitted the justice of the Rule of War of 1756 applied both to the coasting trade and colonial trade of a belligerent state which was thrown open during war,

[1] Kent's *Commentaries* (Abdy's edition), p. 229.

but he condemned, and rightly, the extension in 1793 to all intercourse with the colony of a belligerent and a neutral state. "The Rule of 1756 (as it was at that time applied) seems to me well founded." Halleck, another American publicist, writing fifty years later, adopted the same attitude.[1] So far the United States has not departed from the attitude it assumed from the first towards the Rule of 1756; but the fact that it was not Great Britain which was at first almost, if not quite alone in its support, but another growing naval Power, Germany, which sought to incorporate it into the Declaration of London, bears witness to the soundness of Kent's anticipation of the result of increased sea-power. The German Delegate showed a wise insight as to the potentialities latent in the formerly abused English doctrine. The question of its application is one which must almost inevitably arise in some war of the future, as it is clear that should occasion offer, some naval Powers will certainly resort to its application. Each Power remains free to consider as an enemy every neutral ship taking part in a traffic reserved in time of peace.[2] If an Inter-

[1] *International Law* (4th ed., vol. ii., pp. 340–41).

[2] See Ch. Dupuis, *Le Droit de la guerre maritime d'après les Conférences de La Haye et de Londres*, § 67; Karl H. Bernstein, *Das Seekriegsrecht*, p. 116.

national Prize Court should then be in existence the justice and equity of the doctrine under consideration would presumably in the last resort be examined and determined by it. "It is to be hoped and expected that this Court will declare for the Rule of 1756," says Professor Oppenheim, and the writer fully concurs. So long as the capture of private property at sea exists, the necessity for such a Rule will be felt by belligerents. The power which that right of capture confers of enabling a belligerent to cripple or destroy his adversary's commerce at sea, and to break down his lines of communication, would receive a considerable blow if the Rule were not recognized. "In past days," writes Admiral Mahan, "while reading pretty extensively the arguments *pro* and *con.* as to the rights and duties of neutrals in war, it has been impressed upon me that the much-abused Rule of 1756 stood for a principle which was not only strictly just, but wisely expedient. The gist of the Rule was that the intervention of a neutral for the commercial benefit of a belligerent was as inconsistent with neutrality as it would be to help him with men or arms. The neutral was not to suffer; what he did habitually in peace was open to him in war—except the carriage of contraband and of cargoes hostile in ownership; [1] but what

[1] The latter is not now prohibited since the Declaration of Paris.

was closed to him in peace it was contrary to neutrality to undertake in war for the belligerent's easement." [1]

Every assistance given to a belligerent by neutral merchant ships tends to the lengthening of war, the increased suffering of the combatants and the civilian population and the greater dislocation of the trade of the world. It is surely in accordance with the general principles of justice and equity, and a logical deduction from admitted principles of the duties of neutrals that the Rule of 1756 should be adopted as a generally accepted international legal doctrine.

[1] *Some Neglected Aspects of War*, p. 191.

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